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192

# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1945

No. 12

HEBER KIMBALL CLEVELAND, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

No. 13

HEBER KIMBALL CLEVELAND, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

No. 14

HEBER KIMBALL CLEVELAND, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

No. 15

DAVID BRIGHAM DARGER, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

No. 16

VERGEL Y. JESSOP, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

[CONTINUED ON SECOND COVER]

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 29, 1945.

CERTIORARI GRANTED MARCH 12, 1945.

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1945

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**No. 23**

HEBER KIMBALL CLEVELAND, PETITIONER,

*vs.*

THE UNITED STATES OF AMERICA

**No. 24**

HEBER KIMBALL CLEVELAND, PETITIONER,

*vs.*

THE UNITED STATES OF AMERICA

**No. 25**

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*vs.*

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*vs.*

THE UNITED STATES OF AMERICA

**No. 29**

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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[fol. a] [Caption omitted]

[fol. 1]

**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH**

No. 14475 Criminal

UNITED STATES OF AMERICA, Plaintiff,

v.

HEBER KIMBALL CLEVELAND, Defendant

INDICTMENT—Filed March 6, 1944

The grand jurors for the United States of America impaneled and sworn in the District Court of the United States for the Central Division of the District of Utah at the November term of said court in the year 1943, and inquiring for said District of Utah, upon their oath present:

That heretofore, to-wit, on the 1st day of November, 1941, at Salt Lake City in the Central Division of the District of Utah one Heber Kimball Cleveland alias Fred Cleveland, hereinafter called defendant, unlawfully and feloniously, by means of automobile transportation, to-wit, 1936 Packard Sedan, Motor No. X33083, did knowingly transport, cause to be transported and knowingly aid and assist in obtaining transportation for and in transporting a certain woman, to-wit, Kathryn Lucy Collinwood, from Salt Lake City in the Central Division of the District of Utah to Evanston in the District of Wyoming, then and there for the purpose of debauchery and for a further immoral purpose, to-wit, for the purpose of having sexual intercourse with the aforesaid woman, the said Kathryn Lucy Collinwood, not then being the wife of defendant, and for the further immoral purpose, that the aforesaid woman should be and act as his mistress and concubine; contrary to the form of the statute in such case made and provided and [fol. 2] against the peace and dignity of the United States of America.

A True Bill:

Don Clyde, Foreman of the Grand Jury.

Dan B. Shields, United States Attorney.

IN UNITED STATES DISTRICT COURT

MOTION TO QUASH TRUE BILL—Filed March 20, 1944

Comes now the defendant, Heber Kimball Cleveland, by his counsel and respectfully moves the court to quash each and every count of the alleged True Bill in the above entitled matter, for the reasons and upon the grounds:

I

That said True Bill does not state an offense against the laws of the United States, and in particular does not state an offense under Section 398-T 18 U. S. C. A. Mann Act.

II

That the court is without jurisdiction to try the alleged charge set forth in said alleged True Bill.

III

That the formation and composition of the grand jury which presented the alleged True Bill to this court was and is illegal and void; that the grand jury finding said alleged True Bill, and each member thereof, by reason of bias and prejudice had against this defendant at the time of convening and finding said alleged True Bill, was disqualified under the laws of the United States and of the State of Utah, to sit as grand jurors in this matter, and by reason thereof the substantial rights of this defendant have been impaired and he cannot safely go to trial under said alleged True Bill, and the defendant respectfully requests the court to open up the proceedings of said grand jury for inspection and investigation and to permit such further proceedings as may be justified in support of this assignment.

[fol. 3] This assignment is supported by the affidavit of the defendant herein and which is made a part hereof.

Claude T. Barnes, J. H. McKnight, Knox Patterson,
Attorneys for Defendant.

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CERTIFICATE OF MERIT

We, the undersigned, attorneys for the defendant above named, hereby certify that in our opinion the foregoig Motion to Quash True Bill is meritorious and that the same

is not filed for the purpose of delaying any proceedings.

Dated this 20 day of March, 1944.

Claude T. Barnes, J. H. McKnight, Knox Patterson,
Attorneys for Defendant.

AFFIDAVIT OF HEBER KIMBALL CLEVELAND

STATE OF UTAH,
County of Salt Lake, ss:

Heber Kimball Cleveland, being first duly sworn, deposes and says:

That he is the defendant above named and makes this affidavit in support of a Motion to Quash True Bill filed by his counsel herein as to each count of said alleged True Bill.

That affiant is of the age of 42 years and has been a continuous resident of Salt Lake City, State of Utah, for more than 12 years last past, and was intermittently, prior to said time, a resident of the State of Utah.

That affiant was born of a family who were members of the Church of Jesus Christ of Latter-day Saints, hereinafter referred to as the Mormon Church, and this affiant became a member of said church, formally, in the year 1930.

That affiant has been, all his life, an earnest and profound believer in the doctrine and principles of said Church, and especially this affiant has all his life believed in that particular tenet of said church which teaches the doctrine and practice of plural marriages; and that such doctrine is [fol. 4] especially enjoined upon the members of said church by the teachings thereof and by the Bible upon which it is founded.

That in accordance with the principles and doctrine of said church and the invocation of the members thereof to teach and practice plural marriages, this affiant has always believed in, taught and practiced the doctrine of plural marriages, having upon five separate occasions married in polygamy.

That about the year 1920, there became a breach in the Mormon Church with reference to the practice of polygamy resulting in a large factional disagreement by reason of which the Mormon Church sought to and did attempt to excommunicate many of its members from Church recognition and worship with the dominant church and this affiant was one of such group so attempted to be excommunicated from the dominant church.

That due to the factional disagreement in said Church, intense bitterness has grown up, and said bitter feeling is more intense among the high priesthood and the quorums thereof of the dominant church and the members of said high priest quorums, which said high priest quorums have the actual controlling power of the dominant church and exercise the same and dominant and control all excommunications therefrom and other matters of like importance; that said high priesthood in large measure dominates and controls the thinking and attitudes of the lay members of said church and the members of the lesser priesthood thereof.

This affiant is informed and believes, and so says, that said dominating high priesthood has aided, assisted and incited the bringing of this alleged True Bill and the convening of the grand jury for that purpose, and that one member of said high priesthood, viz., the Bishop of the Ward of which this affiant at said time belonged, informed this affiant, prior to the call and convening of the grand jury which brought this alleged True Bill, that they, the controlling authorities of said dominant church, intended to lay this charge against this affiant and affiant states therefore that this charge was incited by said high priest-[fol. 5] hood; and this affiant, on his information and belief, states further:

That Don Clyde, the foreman of the grand jury presenting this alleged True Bill, is a prominent and dominating figure in the high priesthood quorums of the dominant church and holds official position as such and so this affiant verily believes said Don Clyde, when he sat as a grand juror in this matter, was not qualified to so sit by reason of his animosities, bias and prejudice against persons so accused and so was unable and at all times has been unable to fairly or impartially sit as a grand juror in this matter.

Affiant further says, upon this information and belief, that a large majority of the grand jurors, if not all thereof, are likewise influential members of the Mormon Church and felt themselves impelled to follow the preachings and practice of said church with reference to the excommunicatio.. of this affiant and his associates so attempted to be excommunicated, and that the spirit of animosity and enmity toward this affiant was carried into the considerations of the grand jury in the presentation of said alleged True Bill.

Affiant further says, upon his information and belief, that prosecution of the affiant in this case is a result of combined and concerted action on the part of high church officials to harass and degrade this affiant and other excommunicants and in furtherance thereof such church officials have filed charges involving from 40 to 50 excommunicants and in particular have charged a group of 12 with conspiracy to violate the laws of the United States and that three informants on six overt acts contained in said purported conspiracy charges are members of the high priesthood quorum of the Mormon Church and that the matter alleged to have been mailed by the said alleged conspiring defendants was mailed to the recipients addressed to the high church offices of the Mormon church.

Affiant further states, upon his information and belief, that the majority, if in fact, not all, of the testimony in this matter had and evidence produced before the grand jury which returned this alleged True Bill, was had from members of the priesthood quorums of said dominant church in good standing at the time of said inquisition and that, [fol. 6] therefore, the members of the grand jury was constituted as aforesaid of members of a mind to receive as unimpeachable such testimony and evidence so produced before said grand jury to the prejudice and in violation of the lawful rights of this affiant to have this matter investigated by a fair and impartial grand jury.

Affiant further says that at the General Conference of the Mormon Church held in the month of April, 1931, the supreme head of said Church made declaration, and the record thereof as shown, as follows:

"We have been, however, and we are entirely willing And Anxious, Too, that such offenders against the law of the State (those living in plural marriage) should be dealt with and punished as the law provides. We have been and we are willing to give such Legal Assistance as we legitimately can in the Criminal Prosecution of such cases. We are willing to go to such limits not only because we regard it as our duty as citizens of the country to assist in the enforcement of the law and the suppression of pretended 'plural marriages', but also because we wish to do everything humanly possible to make our attitude toward this matter so clear, definite and unequivocal as to leave no possible doubt of it in the mind of any person. * * * I

would like all those in this congregation who feel to sustain this statement that I have read to you to manifest it as the Apostles and All of the General Authorities have done, by raising their right hands.

"I have never seen such a lot of hands held so high in my life."

"All those who are opposed to this statement will please raise their hands. (no hand was raised.) Our enemies (those believing in the principle of celestial or plural marriage) do not seem to be here." (Brackets ours)

That continuously since said conference the Church has constantly and consistently sought the criminal prosecution of this affiant and his associates and has constantly and persistently continued to otherwise persecute and harass this affiant and his associates.

Affiant mentions these items and shows this evidence of [fol. 7] such bias and prejudice for the purpose of exemplifying to the court the necessity that the records and doings of the grand jury investigation in this matter be opened and proper investigation made thereof and any other proper representation made to this court with respect thereto; and in this connection affiant refers the court to 105-19-5, Utah Code Ann. 1943, Chapters 18 and 19.

This affidavit is made in support of motion to quash in cases numbered 14475, 14476, 14477 Criminal.

Further affiant sayeth naught.

Heber Kimball Cleveland.

Subscribed and sworn to before me this 20 day of March, 1944. Knox Patterson, Notary Public. Residing in Salt Lake City, Utah. My commission expires: May 19, 1947. (Seal.)

Recd. copy of foregoing this 20 day of Mar. 1944, at 9:50 A. M. John S. Boyden, Assistant Dist. Atty.

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IN UNITED STATES DISTRICT COURT

MINUTE ENTRY—March 20, 1944

On this 20th day of March, 1944, plaintiff appearing by John S. Boyden, Assistant United States Attorney, and defendant in person, and by Claude T. Barnes, Knox Patter-

son and J. H. McKnight, his attorneys, and at request of counsel, these three cases were consolidated for further proceedings. Defendant Cleveland was arraigned, gave his true name as Heber Kimball Cleveland, waived reading to him of the indictment, and entered his plea of not guilty to each of the indictments, and to all of the counts. By stipulation of counsel, it is ordered that trial by jury be waived, and case continued until March 21, 1944.

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IN UNITED STATES DISTRICT COURT

STIPULATION OF FACTS—Filed March 20, 1944

Comes now parties in the above entitled action, United States of America by Dan B. Shields, United States Attorney, and John S. Boyden, Assistant United States Attorney, [fol. 8] the defendant Heber Kimball Cleveland by J. H. McKnight, Claude T. Barnes, and Knox Patterson, Attorneys-at-law, and stipulate that the above entitled cases may be tried before the Court sitting without a jury upon the following statement of testimony, which would, were it not for this stipulation, be introduced by the government.

That the records of the County Clerk's office in and for Salt Lake County, Utah, show that the defendant Heber Kimball Cleveland married Zola Chatwin on the 15th day of September, 1938.

That defendant continued to be the lawful husband of Zola Chatwin until the 5th day of April, 1943, when his divorce in Evanston, Wyoming, became final.

That he married Marie Beth Barlow April 12, 1943, at Evanston, Wyoming.

That at the time of the divorce of Cleveland and Zola Chatwin there was no estrangement, and that after Cleveland's divorce from Zola Chatwin he continued to live with her as man and wife.

That he was also living with a girl by the name of Marie Beth Barlow, who had, on the 10th of December, 1941, borne a child by him.

That prior to his living with Marie Beth Barlow he had gone through some religious ceremony according to the beliefs of a religious cult known as Fundamentalists, by them known as plural or Celestial marriage, but contrary to the laws of the states of Utah and Wyoming, and that

Marie Beth Barlow was fourteen years of age at the time she went through said religious ceremony.

That the Juvenile Court of the State of Utah had taken Marie Beth Barlow into custody as a result of the birth of her legally *illegitamate* child, and had released her upon the condition that she have no further connection with the defendant herein.

That in order to evade the ruling of the court, Marie Beth [fol. 9] Barlow was secreted by defendant for a part of time in a tourist camp in Salt Lake, and those inquiring were informed that she had gone to Oregon to visit with relatives.

That the parents of Marie Beth Barlow were also members of the so-called polygamous cult, and that the parents, together with defendant Cleveland and Zola Chatwin, agreed that Zola Chatwin would get a divorce and that after the same had become final, the defendant would marry Marie Beth Barlow at Evanston, Wyoming, with the consent of her parents, which was done at the time aforesaid.

That in September of 1943 Marie Beth Barlow gave birth to another child by Heber Kimball Cleveland.

That a few days prior to August 14, 1941, the defendant was placed in the company of Kathryn Lucy Collinwood, of the age of twenty-one years, at Salt Lake City, by reason of a visit by defendant with a friend at the Salt Lake General Hospital where said Kathryn Lucy Collinwood was in training as a nurse.

That on August 14, 1941, the defendant made a date with Kathryn Lucy Collinwood which was accepted by her; that between the 14th and 16th of August, 1941, inclusive, they spent considerable time together, during which the defendant discussed the matter of plural marriage with Miss Collinwood.

That the marriage was not in accordance with the laws of the state of Utah, but the defendant's plural marriage to this girl was performed by Joseph Musser, a member of the Priesthood Council of the Fundamentalists, on August 16, 1941.

That after her marriage and prior to the 1st of November, 1941, the defendant and Miss Collinwood had engaged in sexual intercourse on several occasions.

That defendant had promised Miss Collinwood a wedding trip or honeymoon, and that for various reasons the same was postponed until November 1, 1941, when the defendant took Miss Collinwood in a 1936 Packard sedan, Motor No.

X33083 from Salt Lake City to Evanston, Wyoming, where [fol. 10] he engaged a room in the Evanston Hotel; that he remained with Miss Collinwood at the Evanston Hotel, where they engaged in sexual relations during the day and night until they returned to Salt Lake City on November 2, 1941.

That after returning to Salt Lake City the defendant also lived with three other plural wives, which included his legal wife.

That a few weeks prior to the 5th day of April, 1942, Kathryn Lucy Collinwood arranged with one Marcia Covington, seventeen years of age, to have a date with the defendant; that other dates were arranged, but defendant did not engage in sexual intercourse with Marcia Covington prior to his plural marriage to her.

That on the evening of April 5th, after defendant and Marcia Covington had spent some time drinking wine, Marcia Covington consented to enter into a plural marriage with defendant; that it was agreed between them that as a honeymoon he would take her to St. George, Utah, there to be married by one of the Priesthood Council, but when it was learned that the person to perform the marriage could not be located, they agreed together to go to California as a honeymoon trip and there be married by a member of the cult.

That upon arrival in California they were not actually married and did not engage in sexual intercourse until consent for such marriage was obtained from Henry Covington, also a member of the cult and father of Marcia Covington.

That they were married by a member of the cult in plural marriage on the 12th day of April, 1942, after which marriage the defendant and Marcia Covington spent the evening and night at Hermosa Beach and at an automobile tourist cabin, and that the next day the defendant took Marcia Covington to see some relatives; that Marcia stayed with these relatives and refused to go further with the marriage.

That upon his return to Salt Lake defendant admitted to Kathryn Lucy Collinwood that he had engaged in sexual intercourse with Marcia the night of their marriage.

[fol. 11] That the automobile used in the aforesaid transportation on April 5th was the same Packard heretofore described and was owned by the defendant.

That about June 27, 1942, as a result of discussion and meetings of leaders of the cult, it was determined that

Kathryn Lucy Collinwood should be immediately taken from the state of Utah, as she was being investigated for doing obstetrics work without a license, and it was believed that her arrest was imminent. As a result, on the 27th day of June, 1942, the defendant took Kathryn Lucy Collinwood to Grand Junction, Colorado, leaving his other plural wives at Salt Lake City; and at Grand Junction, Colorado, he obtained living quarters and a job as a tailor.

That about the 9th day of August, 1942, the defendant informed his plural wife, Kathryn Lucy Collinwood, that he was coming to Salt Lake City to get Marie Beth Barlow and bring her back to Grand Junction so that she might become pregnant.

That on the 9th day of August, 1942, the defendant, in the heretofore described Packard automobile, transported Marie Beth Barlow from Salt Lake City, Utah, to Grand Junction, Colorado, where she lived with him as man and wife, engaging in sexual intercourse.

That during the time Marie Beth Barlow and Kathryn Lucy Collinwood were in Grand Junction he would alternate sleeping with these two women.

That thereafter Marie Beth Barlow was returned to Salt Lake City by the defendant.

That as a result of the sexual relations between defendant and Marie Beth Barlow immediately following the 9th day of August, 1942, Marie Beth Barlow did not become pregnant, and the defendant again informed Kathryn Lucy Collinwood that he would return to Salt Lake City and bring Marie back again in order that she might become pregnant.

That on or about the 12th day of October, 1942, the defendant, again in the same Packard sedan automobile, transparted Marie Beth Barlow from Salt Lake City, Utah, to Grand Junction, Colorado, where he lived with her as man [fol. 12] and wife for a period of several months and that on September 18, 1943, Marie Beth Barlow gave birth to a baby by the defendant, at Salt Lake City, Utah.

That during the time the defendant lived at Grand Junction he would alternate living with his various plural wives and would introduce them to people in Grand Junction as sisters-in-law, or other relatives.

That prior to the 5th day of December, 1942, Kathryn Lucy Collinwood had returned to Salt Lake City and while she was in Salt Lake City the defendant sent word for her to come back to Colorado, and also sent her money to come

on the train; that as a result of such request, on the 5th day of December, 1942, Kathryn Lucy Collinwood took the D. & R. G. Railroad train at Salt Lake City, used the money furnished her by the defendant to buy a ticket, and traveled from Salt Lake City, Utah, to Grand Junction, Colorado, where defendant and Kathryn Lucy Collinwood resumed their sexual relations as man and wife for about one month.

That during all such times herein referred to, with such assistance as his wives might render by themselves working, the defendant took care of his wives and children. Defendant claimed the Fundamentalists taught and practiced the original doctrines of the Mormon Church.

Dan B. Shields, United States Attorney. John S. Boyden, Assistant United States Attorney. Claude T. Barnes, J. H. McKnight, Knox Patterson, Attorneys for defendant.

Dated this 20 day of March, 1944.

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[fol. 13] IN UNITED STATES DISTRICT COURT

MINUTE ENTRY—March 21, 1944

On this 21st day of March, 1944, come again said parties by their respective attorneys as aforesaid, and Defendant Cleveland in person, and said defendant consented that case might be tried on stipulation of facts and jury expressly waived. Ordered that further hearing be continued until March 22, 1944.

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IN UNITED STATES DISTRICT COURT

PORTION OF REPORTER'S TRANSCRIPT—March 21, 1944

Mr. Boyden: Heber Kimball Cleveland, will you come forward please.

You are the defendant in these three cases, 14,476, 14,475 and 14,477?

Mr. Cleveland: Yes, sir.

Mr. Boyden: It is perfectly agreeable with you that the case might be submitted upon an agreed statement of facts as prepared by your counsel in conjunction with our office?

Mr. Cleveland: Yes, sir.

Mr. Boyden: And that after these facts are submitted it may be tried without a jury, and you do hereby expressly waive a jury, consenting it might be tried before the court on this stipulation?

Mr. Cleveland: That is right, yes, sir.

Certificate

I certify that the within pages numbered 1 to 3 inclusive, contain a true and correct transcript of my shorthand notes of the within proceedings had in said cases on March 21, 1944.

E. M. Garnett, Official Reporter.

Filed June 16, 1944.

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[fol. 14] In United States District Court

Motion for Verdict for Defendant—Filed March 22, 1944

Comes now the defendant above named and respectfully moves the above entitled court as follows:

That the True Bill and indictments thereon laid in the above entitled matter be dismissed and the defendant discharged from custody and his bondsmen exonerated.

In support of said motion, and as grounds therefor, the defendant relies and will rely upon the laws of the United States of America, the laws and constitution of the State of Utah applicable in the premises, the files and the record herein, the plea of not guilty entered by defendant, and the following statement:

1. The evidence now before the Court is insufficient to support a verdict or decision of guilt on the part of the defendant.

2. That the charge laid in this matter is not within the contemplation of the section or sections of law cited in the True Bill, and therefore this court is without jurisdiction to do other than dismiss the action.

Dated this 22 day of March, 1944.

Claude T. Barnes, Knox Patterson, J. H. McKnight,
Attorneys for Defendant.

Certificate of Merit

We, the undersigned, attorneys for the defendant above named, do hereby certify that in our opinion the foregoing

Motion is meritorious and that the same is not filed for the purpose of delaying any proceedings.

Dated this 22 day of March, 1944.

Claude T. Barnes, Knox Patterson, J. H. McKnight, Attorneys for Defendant.

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[fol. 15] IN UNITED STATES DISTRICT COURT

MINUTE ENTRY—March 22, 1944

On this 22nd day of March, 1944, come again said parties by their respective attorneys as aforesaid, and further hearing on these cases was resumed. The court heard the arguments of counsel on defendant's motion to quash the indictment, and motion for verdict for defendant, and the motion to quash the indictment was overruled by the court, and ruling on motion for verdict was held in abeyance until briefs are received by the court. Defendant granted until April 12th to submit its brief, and plaintiff until May 3rd, and reply brief of defendant to be submitted May 8th. All briefs to be lodged with the clerk and the clerk to forward same to Judge T. Blake Kennedy at Cheyenne, Wyoming, at which time the case will be taken under advisement. The hearing on the motion to suppress and recover papers and property unlawfully seized was postponed pending outcome of case.

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IN UNITED STATES DISTRICT COURT

JUDGE'S MEMORANDUM—Filed May 22, 1944

Dated May 22, 1944.

KENNEDY, Judge:

The above entitled causes involve indictments against the Defendants in the form of eight separate and distinct charges some of which indictments include more than one count. Eight of these indictments are brought under the Mann Act, or "White Slave Traffic Act", (18 U. S. C. A. 398), and one under the so-called "Lindbergh Act", (18 U. S. C. A. 408a).

After the presiding Judge of the District had retired in consequence of an affidavit of prejudice in one case and

likewise voluntarily withdrew in the other cases, the writer of this memorandum was assigned to the Utah District for the purpose of disposing of said cases.

Motions were interposed by defendants to quash the indictments upon the ground that they were not properly brought under the Acts mentioned, and on account of irregularities occurring in connection with the Grand Jury which [fol. 16] returned the indictments. These Motions to quash were all argued orally and overruled, the first motion upon the ground that the indictments had every appearance of regularity upon the face to be within the scope of the Act under which they were brought, and the second upon the ground that there was no evidence or proof before the Court that there was any bias or prejudice or irregularities in the action of the Grand Jury upon which the Court could presume to act in the premises, other than an allegation that the foreman of said jury was a member of a different sect of which the defendants were alleged to be adherent, which was considered insufficient to sustain the motion in the absence of any affirmative showing that the foreman of the grand jury personally entertained views antagonistic to the defendants or, even if he did, that there was no showing as to any bias or prejudice on the part of any of the other members of the grand jury returning said indictments. The Court will now adhere to the original rulings upon said motions.

After considerable discussion in open Court as to the manner in which said cases would be disposed of, a trial jury being then and there in attendance, it was agreed that the several cases would be submitted to the Court without the intervention of a jury upon a stipulation of facts, and the Trial Judge thereupon reluctantly, if for no other reason than to protect the Court and the community from unsavory details of evidence and unpleasant notoriety, accepted the responsibility with the understanding that the defendants would be severally arraigned, enter their pleas of not guilty, waive trial by jury and agree personally to abide by the stipulation of their counsel as to the facts in each case, which procedure was thereafter carried into effect. On behalf of each and every defendant a motion for his discharge and entry of judgment of not guilty was interposed and the Court provided by order that trial briefs should be filed by counsel after the receipt of which the decision in the *serveral* cases would be taken under advise-

ment. Such trial briefs have been submitted and are now before the Court for consideration.

It would be impractical in this memorandum to set out in detail the charges in the indictments or the stipulated facts [fol. 17] upon which the government relies in support of the charges therein contained, but a brief rehearsal in each of the cases would seem to be necessary as a foundation for a decision of the Court, omitting some of the more sordid details.

In the Cleveland case, No. 14475, it is charged that the defendant transported Kathryn Lucy Collinwood from the State of Utah to the State of Wyoming for the purpose of debauchery and for the purpose of sexual intercourse, said women not then being the wife of the said defendant but for the purpose that she should be and act as his mistress and concubine. In No. 14476 it is charged that he transported Marcia Covington from the State of Utah to the State of California for the same purposes as set forth in the previous indictment; and in No. 14477, in the first count, it is charged that he transported one Marie Beth Barlow from the State of Utah to the State of Colorado for the purposes aforesaid; in the second count it is charged that the defendant transported the same women for the purposes aforesaid from the State of Utah to the State of Colorado, and in the third count that he transported Kathryn Lucy Collinwood from the State of Utah to the State of Wyoming for the same purposes. In the stipulated facts, which were accepted by the agreement as the proofs in the case, it appears that the women were transported by the defendant as charged in the indictments and that sexual relations were indulged between the defendant and each of said women and that he lived with each of said women in the relationship of husband and wife. It is stipulated that the defendant committed said acts as a believer in the practice of polygamy in having more than one wife at the same time and that in so acting he was practicing the origin doctrines of his church.

In the Darger case, No. 14478, the defendant is charged with unlawfully transporting, for the immoral purpose of having one Jean Barlow to live with him as his mistress and concubine, from the State of Colorado to the State of Utah. In the stipulation of facts it is shown that the defendant was married in 1926 to Aldora McDaniel, from whom he secured a divorce in Nevada in April, 1943, but that in 1942

the defendant had two plural wives in addition to his lawful [fol. 18] wife and that one of these, to-wit: Jean Barlow, he transported by automobile from the State of Colorado to the State of Utah where he lived with the said Jean Barlow and his other wives in a state of plural marriage, all of which acts were in accordance with a religious belief of defendant.

In the Jessop case, No. 14480, the indictment charges that the defendant transported one Mae Johnson from the State of Utah to the State of Arizona for the purpose of debauchery and for the further immoral purpose that the said woman should become his mistress and concubine. In the agreed statement as the government testimony, it appears that the defendant was married in 1926 to one Verna Spencer and was and is still the lawful husband of said Verna Spencer, having had nine children as the issue of said marriage. The thereafter one Mae Johnson came to live at the home of the defendant and he secured her agreement to enter into a marriage in accordance with the Fundamentalists' belief in the doctrines and teachings of the Mormon Church and that he lived with her, the said Mae Johnson, as man and wife, at the same time he was living with and supporting his legal wife, and that in July 1943, he transported the said Mae Johnson from the State of Utah to the State of Arizona and there lived with her as man and wife.

In the Chatwin, Zitting and Christensen case, No. 14481, it is charged that the defendants inveigled decoyed one Dorothy Wyler, a minor child of the age of fifteen years, and caused her to be transported from the State of Utah to the State of Arizona. In the stipulation of facts it appears that the government would have offered proof that the defendant, Chatwin, approached the parents of the girl, Dorothy Wyler, with regard to her becoming a housekeeper; that said girl was then about fourteen years of age, backward in school, and had a mental age of about seven years and two months; that while so working in the home of the defendant Chatwin she was taught the doctrine of plural marriage to which she became converted, and entered into a plural marriage with the defendant Chatwin and that thereafter the defendants convinced the said Wyler that she should go to [fol. 19] Mexico to be married legally to the said Chatwin and, in pursuance to such design, she was transported and caused to be transported by the defendants from the State of Utah to Juarez, Mexico where she and the defendant went

through a purported marriage ceremony and thereafter she was transported to Short Creek, Arizona, all of which transportation was without the consent and against the wishes of the parents of the said Dorothy Wyler and while she was under the authority of the Juvenile Court of Utah County, Utah, which said acts were performed in accordance with a religious belief in plural marriages.

In the Dockstader and Stubbs case, No. 14483, it is charged that the defendants did transport and cause to be transported one Anna Lindgreen from the State of Utah to the State of Arizona for the purpose of debauchery and the further immoral purpose that the said woman should cohabit with the defendant Dockstader as his mistress and concubine. In the stipulation it appears that the defendant Dockstader was living in a plural marriage condition with one Anna Lindgreen while at the same time and prior thereto he was married to Leah Kilpack Dockstader in Salt Lake County, Utah; that in July 1943, the defendant Dockstader made arrangements with the defendant Stubbs to transport Anna Lindgreen and some furniture to Short Creek, Arizona where the said Anna Lindgreen was to live in plural marriage with the defendant Dockstader and his legal wife, Leah Kilpack Dockstader; that at the time of said transportation both of said defendants were members of a religious cult known as Fundamentalists and professed belief in the plural marriage under the original concepts of the Mormon Church.

In the Petty case, No. 14489, the defendant is charged with unlawfully transporting, by automobile, one Mary Marguerite Ford, from the State of Idaho to the State of Utah for the immoral purpose of having her to live with him as his mistress and concubine and, in the agreed facts, the government proof would be that the defendant was married to one Iva Campbell in December, 1913 and since said time has continued to be her lawfully wedded husband; that subsequently, in Idaho, he became acquainted with one Mary [fol. 20] Marguerite Ford and that thereafter he secured the consent of said Ford to enter into a marriage according to the concepts of his religious belief and that thereafter he transported the said Ford to the State of Utah and continued to live with her as man and wife while still living with his legal wife.

In the foregoing, as above stated, no attempt has been made to set out in detail all the allegations of the indictments or stipulated facts to be presented by the government in the event the cases had been tried, and to which the defendants assented by their stipulation, but sufficient has been shown to outline the record before the Court for the purpose of a discussion of the legal principles involved.

I think it is clear from what has been stated that, absent the element of a religious belief in plural marriage asserted by the defendants, the evidence would be sufficient to justify the conviction and judgment of guilt as to each. It is asserted in behalf of defendants that the crimes charged do not amount to prostitution or debauchery as set forth in the Statute. The White Slave Traffic Act was passed by Congress in 1910 and, in 1916, it finally came before the United States Supreme Court for construction, in Caminetti v. United States, 242 U. S. 470. There, in several cases consolidated for hearing, it was strenuously asserted that the Act was never intended to cover cases other than those in which commercialized vice was involved but eventually, in spite of the opposition of an earnest minority of the High Court asserted in a dissenting opinion, the Court decided that, under the terms of the Act, the element of gain was not to be interpreted as a necessary element of the crimes specified by the Statute and it was held that the transportation for an immoral purpose, to-wit: that a woman should become a mistress and concubine, was within the terms of the Statute. In all the cases before the Court at the present time where the indictments are brought under this Act this relationship is specifically charged. From that day to this it has been earnestly argued that the Act does not apply to a variety of circumstances in which the purpose of commercial gain does not appear and yet the Supreme Court has never modified nor reversed its de [fol. 21] cision in this respect, nor since the first decision has the Congress proposed to vary or change the terms of the Act which in a sense means that it puts the stamp of approval by the Congress upon the construction given by the Court. It cannot be successfully asserted that if the Congress had intended to cover polygamy in furtherance of a religious belief, it would have so spoken, but on the contrary the more logical reasoning would be that if Congress intended to exempt acts committed in furtherance of religious beliefs, it would have so stated.

Likewise, as to the Kidnapping or Lindbergh Act it has been held by the Supreme Court in Gooch v. United States, 297 U. S. 124, that under the terms "ransom" or "reward" or "otherwise", the Act is not confined to cases in which ransom or reward is specifically involved but that under the term "otherwise" may be included any benefits which may accrue to the violator of the law.

So much for the construction of the indictments and what the Court conceives to be an outline of the evidence in their support under the stipulations. From this analysis the conclusion must be that unless the acts of the defendants, performed in the furtherance of a religious belief, are exempted from the operation of the Statutes, they must be held amenable to their provisions.

We turn therefore to a consideration of this element as a justification and defense of the several acts on the part of the defendants.

In addition to the copious briefs which have been offered are pamphlets, magazine articles, pictures and also complete volumes in book form, which purport to sustain the religious beliefs of the defendants and practice of polygamy in furtherance of such beliefs, for consideration by the Court. These have all been given attention, although they can scarcely be said to aid the Court in the disposition of the matters at hand. The theories in regard to the teachings of the Bible, the Book of Mormon, the Doctrines and Covenants as presented have been at least highly educational to the Court and have been accepted in the spirit in which I believe them to have been tendered. However, I cannot [fol. 22] believe the counsel have advanced them for the purpose of having the Court make a judicial declaration that the doctrine of plural marriage constitutes a "pure religion", but that they are to be considered more from the standpoint of what defendants conceive to be an interference with their religious beliefs as accorded by the Constitution. The Courts have frequently paid their respects to the practice of polygamy and in each instance, so far as I have been able to discover, it has been condemned. No instance has been cited where either the Congress or the Supreme Court have favorably spoken in regard to it. The assertion is made that on these various occasions the observation of the Court in its opinion can be considered as dicta and this Court is willing to so attribute these statements so far

as it may be permissible for the purposes of the discussion, in accordance with the contention of counsel, but there are certain statements in these opinions which must be regarded as fundamental and underlying the treatment of belief in polygamy as well as all religious beliefs in any case where it is pertinent. Some of the cases to which reference has been made are: Reynolds v. United States, 98 U. S. 145; Davis v. Beason, 133 U. S. 333; The Church v. United States, 136 U. S. 1, and United States v. Bitty, 208 U. S. 393.

The real basis of counsel's contention here that the defendants are being illegally and unjustly prosecuted is that their rights under the First Amendment to the United States Constitution have been violated. This Amendment provides "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof—", and it is undoubtedly operative as to the States under the provisions of the Fourteenth Amendment. I have no quarrel with the proposition that every person should be entitled to entertain his own individual religious beliefs but I have entertained the theory, and so expressed it in other cases involving the matter of religious beliefs, that when such beliefs lead to practices which contravene and violate the law of the land, then such beliefs must yield and be subordinated to such law for otherwise government by law would amount to chaos. This view is supported by the language of the [fol. 23] Supreme Court in Reynolds v. United States, supra, at page 166:

• • • "So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." • • •

And this doctrine so announced has never been repudiated or changed so far as I can discover in later pronouncements of the Supreme Court but, on the other hand, it has reiterated the general principle repeatedly since that time. As late as 1943, in Murdock v. Pennsylvania, 319 U. S. 105,

the Court cites the Reynolds and Beason cases in connection with the following observation at page 109:

• • • "Moreover, we do not intimate or suggest in respecting their sincerity that any conduct can be made a religious rite and by the zeal of the practitioners swept into the First Amendment." • • •

In a Republic such as ours laws are adopted through the will of the majority by representatives of the people assembled in legislative forums. In all the States of the Union I believe, and in the State whose lines have been crossed as alleged in the indictments, there are laws enacted which prohibit polygamy or plural marriages. In this respect therefore we have no law which could be invoked here by which such marriages might be legally sustained. It follows that by logical analysis one who takes unto himself more than one wife at the same time violates such law, and any woman who purports to be other than the first and legal wife of a man falls within the classification of a mistress or concubine and if acts are practiced in connection therewith which apply to that class of individuals they fall within the scope of any Act in regard to which there is a prohibition.

It is earnestly argued that because the States have the [fol. 24] exclusive right to make laws respecting polygamy and plural marriage that every case in which that question is involved must be prosecuted exclusively in the State Courts. The answer to that argument is that when certain acts are proven to have been performed which are violative of a Federal Statute they can be prosecuted in the Federal Courts and here the indictments charge, and proof is offered to support them, that the defendants entered into practices with women as mistresses and concubines by transporting them back and forth across State lines which bring the cases at bar within the scope and purpose of the Mann Act as interpreted by the Supreme Court. This Court is in sympathy with the suggestion, personally, that it would prefer to see the cases tried in the State Courts but is not impressed with the logic of the argument, no matter how much the Court might prefer to see that method pursued. The Court is not permitted to evade a judicial responsibility on the ground of caprice or individual desire no matter how strong the inclination may be. As in the case of removals from the State Court, the Court is empowered to remand

a case and from his action in so doing there is no appeal; however this does not justify the Court to lightly pass over the matter of actually deciding judicially what the rights of the litigants may be in invoking the jurisdiction of the Federal Courts. So here, if the acts committed by the defendants fall within the inhibitions prescribed by the Federal Law, the Court is bound to take cognizance of them whether founded upon religious belief or any other form of belief on the part of the offending parties. The Court here is concerned not with religious beliefs which may be maintained freely but with overt acts which are in violation of Statute. In quoting from a preamble to an early act concerning religious freedom, Mr. Chief Justice Waite recites with approval (Reynolds v. United States, supra, at page 163) as follows:

* * * "it is declared 'that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against the peace and good order.' In these two sentences is found the true distinction between what properly belongs to the Church and what to the State." * * *

[fol. 25] Counsel raise the point that because the Mormons arrived in a country which was then under the jurisdiction of Mexico and which by subsequent treaty became a part of the United States and in the treaty the rights to religious beliefs were preserved, that they are not to be interfered with in the matter of polygamous practices. The answer to this argument is that subsequently the territory covered by the treaty was organized by Congress into a territory of the Nation and therefore became subject to the laws of Congress which should be enacted for its government. The Supreme Court in the cases cited, recognized the power of Congress to pass laws for such territorial government including the prohibition of polygamy and plural marriage. No rights along the line of religious beliefs except those guaranteed by the Constitution, were reserved or preserved under the treaty between Mexico and the United States.

The historical documents in the case at bar purport to show that polygamy was taught and practiced by the adherents of the Mormon faith for a period of at least fifty years before 1890. At that time the then President or Head of the Mormon Church issued a Manifesto to the effect that polygamy would be no longer taught or encouraged and its

adherents were enjoined to refrain from marriages forbidden by the law of the land. The Mormon Church proper, spoken of in these cases as the "dominant" Mormon Church, still maintains the attitude as expressed by its Head in 1890. There was evidently a split in the Church (which is not unusual in all classes of Churches) and the adherents of the polygamistic doctrine, calling themselves "Fundamentalists" to which the defendants purport to belong, have appeared as not only earnest advocates of polygamy but have practiced it literally. This in a way forces the Court to the unenviable situation of sitting in judgment between factions in a Church fight. It is mentioned for the reason that defendants' counsel urge that there was no authority or power of Congress to include in its Act of Admission and in the Constitution tendered by the people of Utah incident to its desire to be admitted as a State, a provision that "polygamy or plural marriages are forever prohibited." Through the Act of Admission and the Constitution tendered and approved at the time, this [fol. 26] provision became a covenant or contract between the United States and the State of Utah which legally and morally should be respected. The people of Utah, through their legal constitutional body of legisiative representatives, have kept this faith by enacting a law which carries the provision into effect. The majority of the people of Utah territory acted in behalf of all the people in adopting its constitution and its laws respecting polygamy under it. The argument therefore that the people of Utah who may still believe in and practice polygamy are not controlled by the Act of Congress and the Constitution of Utah is ingenious but specious and not convincing.

Counsel have supplied the Court with the opinion of Judge Symes in United States v. Barlow, No. 14479 Criminal (not reported) in which the Court sustained a motion to quash an indictment charging a conspiracy to violate the Act of Congress relating to the mailing of obscene, lewd or lascivious matter which was in fact literature purporting to support the religious belief in polygamy. I have no desire to interpose my views as a Judge in the matter in which this particular case has been disposed of, however I can readily see how that case may be differentiated from the cases at bar. In the first place, that part of the opinion which was adopted as a sample of what the literature so mailed really contained could scarcely be classified as

obscene, lewd or lascivious but, in the second place, the literature being in furtherance of teaching a religious belief in polygamy might fairly be considered as being not only in consonance with the First Amendment guaranteeing the freedom of religion but also that other freedom in the same Amendment forbidding the "abridging of freedom of speech or of the press." In the cases under consideration here the indictments deal with overt acts actually carried on and practiced in connection with an asserted religious belief but nevertheless contrary to the law.

What has been said with relation to the White Slave Traffic Act applies equally in principle with the application to the Kidnapping Act. While the Courts of the country are always open to the appeal of its citizens to the protection of their rights in every respect, yet it must be apparent [fol. 27] that the jurisdiction and authority of the Courts are limited to a narrow scope. It would seem more logical that the appeal for relief for those who now hold views concerning religious beliefs and practices thereunder should be made to the legislative branches of government for the adoption of laws consistent with their respective doctrines for after all, in a Republic which is at least supposed to be governed by the people themselves through representatives legally selected, the fundamental rights of the people are there vested and determined, which determination is final unless it can be said that the laws so enacted are in contravention of the Constitution, the supreme law of the land.

Apology is made for the rather inordinate length of this memorandum but the matter has seemed so important to counsel that I have felt justified in discussing it from as many angles as would seem pertinent to a conclusion upon the issues presented.

For the reasons stated, not only the motions to quash but also the motions for verdicts of not guilty and for discharge of the defendants will be overruled and denied and defendants will each and severally be adjudged to be guilty of the charges laid in the indictments. A journal entry may be made by the Clerk to that effect and further entry of an order that the defendants may remain at liberty upon their respective bonds subject to such order as the Court may make for their appearance at a time when they should appear for final judgment. This time will be determined when the Trial Judge can find it possible to again sit for this pur-

pose. In the event the defendants desire to carry their cases to the higher courts, the matter of the appropriate procedure will then be considered.

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IN UNITED STATES DISTRICT COURT

MINUTE ENTRY—May 22, 1944

On this 22nd day of May, 1944, the above cases having been under advisement by Judge T. Blake Kennedy, and an opinion this day was handed down and filed denying motions to quash and motions for verdicts of not guilty and for [fol. 28] discharge of the defendants and adjudging the defendants guilty of the charges in the indictment pursuant to said opinion. It is ordered by the court that the defendants may remain at liberty upon their respective bonds subject to such order as the court may make for their appearance at a time when they should appear for final judgment.

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IN UNITED STATES DISTRICT COURT

VERDICT BY THE COURT—Filed June 7, 1944

The above named defendant in open court having waived a trial by jury and having consented that said cause may be tried before this Court without a jury upon a written stipulation of facts which has heretofore been submitted to this Court, and briefs having been filed by counsel for the United States of America, and by counsel for the defendants herein, and the matter having been taken under advisement, and the Court having considered the evidence introduced by such stipulations and having also considered the briefs of counsel filed as aforesaid, and the matter having been given due consideration, now,

Therefore, I, T. Blake Kennedy, District Judge sitting within and for the District of Utah, do hereby find the Defendant Heber Kimball Cleveland, guilty as charged in the Indictment herein.

Dated: June 7, 1944.

T. Blake Kennedy, United States District Judge
Sitting within and for the District of Utah.

IN UNITED STATES DISTRICT COURT

MINUTE ENTRY—June 7, 1944

On this 7th day of June, 1944, plaintiff appearing by John S. Boyden, Assistant United States Attorney, and Defendant Cleveland appearing in person and by Claude T. Barnes, J. H. McKnight and Knox Patterson, his attorneys. The Court declared Defendant Cleveland guilty, and the following verdict was signed and filed in open court:

[The verdict appears at page 28.]

[fol. 29] The said defendant was asked if he had any reason to show why sentence should not be pronounced, and no reason being shown, the Court ordered defendant Cleveland committed to the custody of the Attorney General for imprisonment for the period of three years in an institution to be designated by the Attorney General. Judgment and Commitment signed by the Court and entered herein. The Court fixed the appeal bond in the sum of $4000.00, and ordered the bond approved by the Clerk. Defendant ordered committed to the custody of the United States Marshal until said bond was approved.

It was further ordered that a certain portion of the Court Reporter's transcript, wherein said defendants stated in open court that jury proceedings would be waived, together with all proceedings taken this day, be transcribed by the court reporter and same to be included in the record of appeal.

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IN UNITED STATES DISTRICT COURT

No. 14475

UNITED STATES

v.

HEBER KIMBALL CLEVELAND

JUDGMENT AND COMMITMENT

On this 7th day of June, 1944, came the United States Attorney, and the defendant Heber Kimball Cleveland appearing in proper person, and with counsel and,

The defendant having been convicted on verdict of the Court of the offense charged in the Indictment in the above-

entitled cause, to-wit: Vio. U. S. C. Title 18, Sec. 398—Mann Act; and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of—Three (3) Years.

[fol. 30] It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

T. Blake Kennedy, United States District Judge.

SUMMARY OF BOND

Bond in sum of $4,000.00, Sylvia G. Michels and Althea F. Beagley as sureties, approved by Clerk and filed June 7, 1944.

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IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed June 8, 1944

Heber Kimball Cleveland, 1361 So. 9th East, Salt Lake City, Utah, Appellant.

Joseph H. McKnight, Atlas Block, Salt Lake City, Utah, Claude T. Barnes, 614 First Nat'l Bank Bldg., Salt Lake City, Utah, Knox Patterson, Boston Building, Salt Lake City, Utah, Attorneys for Appellants.

Offense: Vio. Sec. 398, T. 18, U. S. C.: Mann Act.

Brief description of judgment and sentence: 3 years.

Name of prison where now confined, if not on bail: Defendant is now on bail.

I, the above named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Tenth Circuit from the judgment above mentioned on the grounds set forth below.

Heber Kimball Cleveland, Appellant.

Dated June 7th, 1944.

Grounds of Appeal:

(a) The Court erred in its failure and refusal to grant the defendant's motion to quash the information in said cause.

[fol. 31] (b) The judgment is against law and the evidence.

(c) The statute is not applicable to the facts.

(d) The judgment violates the right of the defendant to the free exercise of religious belief, under the Constitution of the United States, and the Treaty of Guadalupe Hidalgo.

(e) The facts show no intent to violate the statute; and show only an offense against state statutes.

(f) There is no proof of immorality; no proof of debauchery, lasciviousness, indecency or lewdness, or proof of any act against peace and good order, or against good morals.

Rec'd copy June 8, 1944.

John S. Boyden, Asst. U. S. Atty.

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IN UNITED STATES DISTRICT COURT

FORM OF CLERK'S STATEMENT OF DOCKET ENTRIES TO BE FORWARDED UNDER RULE IV

No. 14475, Criminal

UNITED STATES OF AMERICA

vs.

HEBER KIMBALL CLEVELAND

1. Indictment for violation of Section 398, Title 18, U. S. C. A.—Mann Act—filed March 6, 1944.

2. Arraignment March 7, 1944.

3. Plea to indictment of "Not Guilty" entered on March 20, 1944.

4. Motion to withdraw plea of guilty denied —, 19—.

5. Trial by court if jury waived March 21, 1944.

6. Verdict or finding of guilt signed by the court and filed June 7, 1944.

7. Judgment—(with terms of sentence) Defendant Cleveland committed to the custody of the Attorney General for imprisonment for a period of three (3) years entered June 7, 1944.

[fol. 32] 8. Notice of appeal filed June 8, 1944.

Date June 8, 1944.

Attest W. B. Wilson, Clerk.

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IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed June 21, 1944

I

The Court erred in its failure and refusal to grant the defendant's Motion to Quash the information in said causes.

II

The Court erred in its failure and refusal to find that the grand jury, finding the True Bill in said cause, was prejudiced and biased against this defendant.

III

The Court erred in finding the facts in the case, and the prosecution thereof, were applicable to Section 398, T. 18 U. S. C. A., known as the Mann Act.

IV

The Court erred in denying this defendant's constitutional rights, under the Constitution of the State of Utah, under Article 1, sections 1, 4, 7, 11, 12 and 24; Article 3, and Article 6, sub-sections 5 and 18; and likewise erred in denying this defendant's constitutional rights under the 1st, 4th, 5th, 6th, 8th and 14th amendments to the Constitution of the United States.

V

The Court erred in disregarding the defendant's rights under the Treaty of Guadalupe Hidalgo, in the free exercise of his religion.

VI

The Court erred in finding the defendant had a criminal intent in the commission of the acts charged in the information, and shown by the stipulated testimony in said cause.

VII

The Court erred in finding that this defendant violated [fol. 33] the laws of the State of Utah, in connection with Federal statutes to give rise to federal prosecution.

VIII

The Court erred in finding that the transportation of plural wives, as shown by the stipulated testimony in said cause, constituted prostitution or debauchery.

IX

The Court erred in finding that the doctrine of ejusdem generis had no application under the so-called Mann Act.

X

The Court erred in finding this defendant guilty under the charge as laid down under the stipulated testimony in the case against the plea of not guilty entered by this defendant.

XI

The Court erred in its failure and refusal to give this defendant the opportunity to file his motion for new trial as provided by the statutes and rules of this Court in such case made and provided.

XII

The Court erred in sentencing this defendant under the finding of guilty, in that the Court lost jurisdiction by reason of its failure and refusal to grant this defendant the opportunity of filing a motion for new trial in said cause, and by reason of all of the assignments herein made.

XIII

The Court erred in finding that the defendant was guilty of an overt act, under the Mann Act, after having entered the status of plural marriage.

XIV

The Court erred in failing to find that the commission of the act charged under the stipulated testimony, was the result of an honest, Christian and Biblical religious belief.

XV

(a) The Court erred in finding the defendant guilty be-
[fol. 34] cause the defendant violated a state statute, and that such violation alone constituted prostitution and debauchery.

(b) And the Court erred in this by reason of entire lack of jurisdiction under or by reason of the provisions of a state statute.

XVI

The Court erred in passing upon the morals, or the contrary, involved in a marriage relation, such being a peculiar and exclusive prerogative of State Legislators and State Courts, and the entire lack of both legislative or judicial determination by the State of Utah.

XVII

The Court erred in declaring upon the status of a marriage, stipulated to have been entered into under sincere religious belief in its validity by contracting parties; and is, and was, wholly without any jurisdiction so to adjudicate.

Claude T. Barnes, J. H. McKnight, Knox Patterson,
Attorneys for the Defendant.

Received copy of the above and foregoing Assignments of Error this 21st day of June, 1944.

Dan B. Shields, John S. Boyden, U. S. Attorney.

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In United States District Court

Praecipe for Transcript of Record—Filed June 21, 1944

To the Clerk, District Court of the United States for the District of Utah in and for the Central Division:

The appellant, Heber Kimball Cleveland, hereby directs that in preparing the transcript of the record in this cause

in the District Court of the United States for the District of Utah, you include the following:

1. Indictment.

[fol. 35] 2. Stipulation of Facts.

3. Minute Entry of March 20, 1944.

4. Minute Entry of March 21, 1944.

5. Judgment Entry of June 7, 1944.

All other pleadings, minute entries and stenographic report of Case #14478 are applicable to this case.

Claude T. Barnes, J. H. McKnight, Knox Patterson, Attorneys for Defendant.

Received copy this 21st day of June, 1944.

Dan B. Shields, United States Attorney; John S. Boyden, Assistant United States Attorney.

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IN UNITED STATES DISTRICT COURT

STIPULATION AND ORDER—Filed June 26, 1944

It is hereby stipulated by John S. Boyden, Assistant United States Attorney for the District of Utah, Central Division, having charge of the prosecution of the above entitled cause, and Claude T. Barnes, J. H. McKnight and Knox Patterson, attorneys for the above named defendant, that the stipulated testimony in said cause shall be and constitute the Bill of Exceptions on appeal in said cause.

Dated this 22nd day of June, 1944.

John S. Boyden, Assistant U. S. Attorney; Claude T. Barnes, J. H. McKnight, Knox Patterson.

[fol. 36] ORDER

In accordance with the foregoing stipulation, It Is Hereby Ordered that the stipulated testimony in the above entitled cause shall be and constitute the Bill of Exceptions on appeal in said cause.

Dated this 24th day of June, 1944.

T. Blake Kennedy, Judge.

IN UNITED STATES DISTRICT COURT

STIPULATION—Filed July 7, 1944

It is hereby stipulated by the parties hereto, through their respective attorneys, that the reporter's transcript of the proceedings of the above-entitled court on June 7, 1944, may be shortened by the elimination of matter pertaining to sentences and may include such portions only as are presented herewith.

Dated this 5th day of July, 1944.

Dan B. Shields, Attorney for the United States; Claude T. Barnes, J. H. McKnight, Knox Patterson, Attorneys for Defendant.

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IN UNITED STATES DISTRICT COURT

PORTION OF REPORTER'S TRANSCRIPT OF PROCEEDINGS—June 7, 1944

(Reporter called in at approximately 10:15 A. M. and the following proceedings were thereupon recorded:)

The Court: The statute says motions after verdict or finding of guilt shall be made and determined promptly, but it does not say you could not file the motion after.

Mr. Barnes: The second paragraph, your Honor, about three days.

[fol. 37] The Court: After verdict or finding of guilt, shall be made within three days.

Mr. Barnes: Could be made within 60 days if on the ground of newly discovered evidence.

The Court: Yes.

Mr. Boyden: You don't contend the court would have to wait 60 days to sentence?

Mr. Barnes: We don't want the court to wait a minute. We are trying to accommodate everybody.

The Court: My point is I am here ready to sentence now. If you want to file your motion for a new trial—it says you must file them promptly—you have had two weeks. If you want to do that now you may do it and I will dispose of them at once and then sentence. If you want to defer that, I will sentence now and you can file your motion

afterwards. You can use your own judgment in respect to it.

Mr. Barnes: We are afraid we would lose jurisdiction—that is, your Honor would.

The Court: I do not see how you figure I would lose jurisdiction. Who would have jurisdiction—if you haven't filed an appeal?

Mr. Barnes: The motions would not then be filed before sentence. The moment your Honor sentences these people you lose jurisdiction, except for the purpose of assisting to determine the procedure on appeal, as to the record that goes up on appeal.

The Court: Suppose you do not appeal.

Mr. Barnes: Of course we are going to appeal.

The Court: I know you are.

Mr. Barnes: We have five days after we——

The Court: But supposing you did not appeal—the presumption that you are has nothing to do with it—can not be indulged—Suppose I sentence them now, and we assume you did not appeal, I would lose jurisdiction in what?

[fol. 38] Mr. Barnes: I think you would lose jurisdiction of the appellate matters in that respect.

The Court: I would not lose jurisdiction in the appellate matters until—if you are referring to your rule—until your notice of appeal is filed. That is what causes the court to lose jurisdiction.

Mr. Patterson: Does your Honor hold that we may file the motion for a new trial after sentence?

The Court: I am saying you will either file it before or afterwards, because I am here to sentence. I do not think there is anything in the point that the court loses jurisdiction. The thing that makes you lose jurisdiction is the proposition that you have filed your notice of appeal. From that time on the appellate court has jurisdiction, with exception of certain things that the trial court can do.

Mr. Patterson: Suppose we filed motion for a new trial after sentence—say we have the three days period that the statute allows for that purpose, and then it was more than five days after filing the motion before it was heard. Then would you say the five days appeal time expired in the meantime after sentence, or would the appeal run from the overruling of the motion for a new trial?

The Court: I think your appeal would run from the overruling of the motion.

I am going to dispose of the motions here, if you have any, today. I do not see what difference it would make. I am trying to help you all I can. I want these cases reviewed by the appellate courts, and I have indicated in my memorandum so you would be ready here.

Now, then, I intended when I came out that you would be prepared with your notice of appeal, be prepared with your bonds, you would have everything then in shape so your defendants would be released on bond, and your notice of appeal; you then have forty days, and you could get additional time to get up your record.

Mr. Barnes: We have the notice of appeal ready. We can not file that until we know what the sentence is.

[fol. 39] The Court: I will give you time to do that, as far as that is concerned. I will have to sign the sentence, anyway, under the statute.

Mr. Barnes: We can have those ready in about three hours. You were going to leave this afternoon?

The Court: I am leaving at five o'clock.

Mr. Patterson: Suppose we file the motion for a new trial by two o'clock, and then the court give us a short time to submit to the court by brief——

The Court: No, I won't do that.

Mr. Patterson: We have some particular authority—All right, suppose we submit the motion for a new trial at two o'clock. If the court doesn't want us to discuss the matter, the court will overrule the motion, then our time for appeal will start.

The Court: If you have your motions ready, file them now, if you want to file them before sentence, and I will hear you now.

Mr. Barnes: If your Honor would do that, over our objection—we want time to prepare the motion.

The Court: I assume everything I say is over your objection. You can have that in the record.

Mr. Barnes: If your Honor declines to give us time to prepare motions for new trial based on newly discovered evidence, we can submit the others now.

Mr. Boyden: The court has not said that.

Mr. Barnes: If that is your Honors ruling——

The Court: I do not understand by that rule that on the supposition that you—for instance, take it under the rule in regard to newly discovered evidence, do you suppose that

contemplates the court has to sit around sixty days before sentence is made?

Mr. Barnes: No—it would, probably, in the ordinary event; but we don't want time that way.

[fol. 40] The Court: I know—I am asking how you interpret that rule. That is ridiculous.

Mr. Barnes: It is dangerous in my view for us to make motion for new trial after sentence. I don't think the rule contemplates that.

The Court: If you ask now to present your motion on newly discovered evidence, then it indicates you knew about it and could have been prepared here.

Mr. Patterson: Just as we told the court we thought our motions would be premature, and I am sure the district attorney agreed with us, if filed prior to the finding of the court here—the formal finding of guilty.

The Court: You could have had them prepared.

Mr. Patterson: We have motions prepared, your Honor; but still, we didn't know just what course the court would take. In your decision you indicated the mechanics of it would be worked out when you arrived.

The Court: The mechanics of the sentence—mechanics of the appeal—that is what I said—the only thing I contemplated.

Mr. Patterson: The motion for a new trial is a necessary step in appeal.

The Court: No, it is not a necessary step, at all.

Mr. Patterson: We might consider it such.

Mr. Barnes: Will you Honor hold now that we must file this motion for a new trial now or you will proceed to sentence?

The Court: How soon can you have them? I am going to hear them while I am here now.

Mr. Patterson: Under compulsion, we will file them by two o'clock.

Mr. Barnes: Or we can file them right now with respect to all but——

The Court: That doesn't do any good, disposing of them piecemeal. That doesn't do any good.

[fol. 41] I certainly think, and I will rule on the proposition with regard to requiring them to be filed, if you are going to file them by two o'clock. But I will embrace in my ruling that on newly discovered evidence you are not bound to file them before sentence; that would be ridiculous.

That will give my thought, at least, to the appellate court, whether you are bound to file on newly discovered evidence before sentence.

Mr. Barnes: We will also try to have by two o'clock, your Honor, notice of appeal, so you can advise us what documents you want to go up. By two o'clock we will try to have those.

The Court: I do not advise you as to any documents—what documents?

Mr. Barnes: Your Honor has supervision over what part of the record you want to go up. That is very simple here.

The Court: No, I haven't any supervision over that, under the rules. It says you call counsel together and determine on the proposition. I will call you together now—you are together—my idea is that you should send up the complete transcript of record in this case.

Mr. Barnes: Including any exhibits—well, there weren't any exhibits—just a complete judgment roll?

The Court: It is on an agreed statement of facts. You have no transcript of testimony.

(Recess to 2 P. M.)

2:00 P. M. (After recess.)

Mr. Barnes: I would like the record to show an exception to the Court's ruling this morning.

During the noon hour we have prepared notice of appeal, and in view of your Honor's ruling we haven't had time to make motions for new trial, so the defendants are ready for sentence.

The Court: Very well.

Mr. Patterson: I would like to make a short statement for the record in regard to a matter.

[fol. 42] When the court suggested giving us until two o'clock in which to file our motions for new trial, we were disturbed somewhat as to whether or not filing a motion after sentence would toll our statute for appeal, and we feel we had better stand upon our record and ask for the three-day period which we feel we have within which to file the motions for new trial.

I guess the court disposed of that this morning.

The way we feel about it, we do not feel justified in filing them now, because of some information we haven't got that we can not incorporate the point with reference to newly discovered evidence on any motion to be filed now, so if

the court holds that we can not have the three-day period within which to file our motion for a new trial——

The Court: My answer to that is this, Mr. Patterson: that you have had over two weeks after you knew what the court's decision was, within which to prepare your motion for a new trial. And the rules say they shall be filed promptly. And therefore you should have had them ready and filed long before.

And as far as newly discovered evidence is concerned, I certainly do not believe that the rules contemplate that a court after verdict has got to wait sixty days before he passes sentence.

Mr. Patterson: I am frank to say I don't know about that. I think we are justified in construing the memorandum decision as such only, and that the court's finding here this morning is the record which shows their conviction, and we feel we are entitled to a three-day period after that time.

The Court: Whatever rights are preserved by your exception, you will have them.

Mr. Patterson: We would like an exception on that point, your Honor.

• • • • • • •

The Court: Yes. You must file your notice of appeal before——

Mr. Barnes: We have them ready now. We are serving [fol. 43] them right now. That is in order that your Honor will not be inconvenienced. After this notice of appeal is filed with the Clerk, the clerk is supposed to notify you, then you are supposed to give us instructions concerning what papers are to go up on appeal.

The Court: The rule doesn't say that. Read that rule.

Mr. Barnes (Reads): "The clerk of the trial court shall immediately notify the trial judge of the filing of the notice of appeal, and thereupon the trial judge shall at once direct the appellant or his attorney, and the United States Attorney, to appear before him, and shall give such directions as may be appropriate with respect to the preparation of the record on appeal, including directions for the purpose of making promptly available all necessary transcripts of testimony and proceedings.

The action and directions contemplated by this rule may be had and given by the trial judge at any place he may

designate within the judicial district where the conviction was had."

Now, by serving this notice of appeal now, your Honor may take that notice and then we will get such instructions now, so you can go back this afternoon.

The Court: Mr. Clerk, as soon as these are filed, notify me and I will notify counsel to meet me in Chambers at once. I don't know that there is any particular place we ought to meet. I thought inasmuch as this proceedings has been simplified so much—there is no testimony, no testimony taken in any way——

Mr. Barnes: The only thing we want is the stenographer's notes of today's proceedings. If your Honor will permit, we might stipulate with Mr. Boyden that the stenographer's notes as of today may be considered as part of the record; that is all we will want.

Mr. Patterson: Including all the other papers filed with the court.

Mr. Barnes: Surely.

The Court: Yes, it will be an entire clerk's record.

[fols. 44-46] Mr. Boyden: That doesn't mean that you want the briefs part of the record, too?

Mr. Barnes: No, no. We want these oral proceedings here today as part of this record; and then we are through.

The Court: Yes, that is right.

Mr. Barnes: Do you stipulate to that, Mr. Boyden?

Mr. Boyden: I don't think that requires a stipulation. If all the records are there, I don't want anything more than that.

Mr. Barnes: If we don't do that, we have to have a bill of exceptions settled by your Honor.

The Court: No.

Mr. Boyden: We can stipulate on that easily enough, your Honor, that is, on settlement later on. He is talking about preparing the record for printing. I can stipulate with them. I always do.

Mr. Barnes: I want this as part of the record on appeal. And then your Honor is through. You don't have anything more to do about it. You have told us now about appeal, and all that. If Mr. Boyden will stipulate that this transcript, when certified by the reporter, may be considered as part of the record, we are through right now.

Mr. Boyden: I don't have any objection to that being part of the record.

Mr. Barnes: Will your Honor make that order now?

The Court: Yes; the reporter will get out and transcribe all of today's proceedings in these cases and file it with the clerk. He is directed to file it as part of the record in these cases.

Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 47] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

No. 14476 Criminal

UNITED STATES OF AMERICA, Plaintiff,

v.

HEBER KIMBALL CLEVELAND, Defendant

INDICTMENT—Filed March 6, 1944

The grand jurors for the United States of America impaneled and sworn in the District Court of the United States for the Central Division of the District of Utah at the November term of said court in the year 1943, and inquiring for said District of Utah, upon their oath present:

That heretofore, towit, on the 5th day of April, 1942, at Salt Lake City in the Central Division of the District of Utah one Heber Kimball Cleveland alias Fred Cleveland, hereinafter called defendant, unlawfully and feloniously, by means of automobile transportation, to-wit, 1936 Packard Sedan, Motor No. X33083, did knowingly transport, cause to be transported and knowingly aid and assist in obtaining transportation for and in transporting a certain woman, to-wit, Marcia Covington, from Salt Lake City in the Central Division of the District of Utah to Los Angeles in the District of California, then and there for the purpose of debauchery and for a further immoral purpose, to-wit, for the purpose of having sexual intercourse with the aforesaid woman, the said Marcia Covington, not then being the wife of defendant, and for the further immoral purpose that the aforesaid woman should be and act as his mistress and concubine; contrary to the form of the statute in such case made

[fol. 48] and provided and against the peace and dignity of the United States of America.

A True Bill:

Don Clyde, Foreman of the Grand Jury.

Dan B. Shields, United States Attorney.

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[The motion to quash true bill is identical with the motion to quash in case No. 14475, which appears at page 2.]

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[The minute entry of March 20, 1944, is identical with the minute entry in case No. 14475, which appears at page 7.]

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[The stipulation of facts is identical with the statement of facts in case No. 14475, which appears at page 7.]

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[The minute entry of March 21, 1944, is identical with the minute entry in case No. 14475, which appears at page 13.]

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[The reporter's transcript March 21, 1944, is identical with the reporter's transcript in case No. 14475, which appears at page 13.]

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[The motion for verdict for defendant is identical with the motion for verdict for defendant in case No. 14475, which appears at page 14.]

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[The minute entry of March 22, 1944, is identical with the minute entry in case No. 14475, which appears at page 15.]

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[fol. 49] [The memorandum opinion is identical with the opinion in case No. 14475, which appears at page 15.]

[The minute entry of May 22, 1944, is identical with the minute entry in case No. 14475, which appears at page 27.]

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IN UNITED STATES DISTRICT COURT

VERDICT BY THE COURT—Filed June 7, 1944

The above named defendant in open court having waived a trial by jury and having consented that said cause may be tried before this Court without a jury upon a written stipulation of facts which has heretofore been submitted to this Court, and briefs having been filed by counsel for the United States of America, and by counsel for the defendant herein, and the matter having been taken under advisement, and the Court having considered the evidence introduced by such stipulations and having also considered the briefs of counsel filed as aforesaid, and the matter having been given due consideration, now,

Therefore, I, T. Blake Kennedy, District Judge sitting within and for the District of Utah, do hereby find the Defendant Heber Kimball Cleveland, guilty as charged in the Indictment herein.

Dated: June 7, 1944.

T. Blake Kennedy, United States District Judge Sitting within and for the District of Utah.

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IN UNITED STATES DISTRICT COURT

MINUTE ENTRY—June 7, 1944.

On this 7th day of June, 1944, plaintiff appearing by John S. Boyden, Assistant United States Attorney, and Defendant Cleveland appearing in person and by Claude T. Barnes, J. H. McKnight, and Knox Patterson, his attorneys. The court declared Defendant Cleveland guilty, and the following verdict was signed and filed in open court:

[The verdict appears at page 49.]

[fol. 50] The said defendant was asked if he had any reason to show why sentence should not be pronounced, and no reason being shown, the court ordered Defendant Cleveland committed to the custody of the Attorney General for imprisonment for the period of three years in an institution to be designated by the Attorney General, and sentence to

run concurrently with sentence imposed in case No. 14475, Criminal. Judgment and commitment signed by the court and entered herein. The court fixed the appeal bond in the sum of $4,000.00 and ordered the bond approved by the clerk. Defendant ordered committed to the custody of the United States Marshal until said bond was approved.

It was further ordered that a certain portion of the Court Reporter's transcript, wherein said defendants stated in open court that jury proceedings would be waived, together with all proceedings taken this day, be transcribed by the court reporter and same to be included in the record of appeal.

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IN UNITED STATES DISTRICT COURT

No. 14476

UNITED STATES

v.

HEBER KIMBALL CLEVELAND

JUDGMENT AND COMMITMENT

On this 7th day of June, 1944, came the United States Attorney, and the defendant Heber Kimball Cleveland appearing in proper person, and with counsel and,

The defendant having been convicted on verdict of the Court of the offense charged in the Indictment in the above-entitled cause, to-wit: Vio. Sec. 398 Title 18, U. S. C. A.—Mann Act and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of—Three [fol. 51] (3) Years and sentence to run concurrently with sentence imposed in Case No. 14475, Criminal.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

T. Blake Kennedy, United States District Judge.

SUMMARY OF BOND

Bond in the sum of $4,000, Sylvia G. Michels and Althea F. Beagley as sureties, approved by Clerk and filed June 7, 1944.

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IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed June 8, 1944

Heber Kimball Cleveland, 1361 So. 9th East, Salt Lake City, Utah, Appellant.

Joseph H. McKnight, Atlas Block, Salt Lake City, Utah, Claude T. Barnes, 614 First Nat'l Bank Bldg., Salt Lake City, Utah, Knox Patterson, Boston Building, Salt Lake City, Utah, Attorneys for Appellants.

Filed June 8, 1944.

Offense: Vio. Sec. 398, T. 18, U. S. C. a Mann Act.

Brief description of judgment and sentence: 3 years to run concurrently with No. 14475.

Name of prison where now confined, if not on bail: Defendant is now on bail.

I, the above named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Tenth Circuit from the judgment above mentioned on the grounds set forth below.

Heber Kimball Cleveland, Appellant.

Dated June 7th, 1944.

[fol. 52] Grounds of Appeal:

(a) The Court erred in its failure and refusal to grant the defendant's motion to quash the information in said cause.

(b) The judgment is against law and the evidence.

(c) The statute is not applicable to the facts.

(d) The judgment violates the right of the defendant to the free exercise of religious belief, under the Constitution of the United States, and the Treaty of Guadalupe Hidalgo.

(e) The facts show no intent to violate the statute; and show only an offense against state statutes.

(f) There is no proof of immorality; no proof of debauchery, lasciviousness, indecency or lewdness, or proof of any act against peace and good order, or against good morals.

Rec'd copy June 8, 1944.

John S. Boyden, Asst. U. S. Atty.

IN UNITED STATES DISTRICT COURT

FORM OF CLERK'S STATEMENT OF DOCKET ENTRIES TO BE FORWARDED UNDER RULE IV.

No. 14476, Criminal

UNITED STATES OF AMERICA

vs.

HEBER KIMBALL CLEVELAND

1. Indictment for violation of Section 398, Title 18, U. S. C. A.—Mann Act filed March 6, 1944.
2. Arraignment March 7, 1944.
3. Plea to indictment of "Not Guilty" entered on March 20, 1944.
4. Motion to withdraw plea of guilty denied —— ——, 19—.
5. Trial by court if jury waived March 21, 1944.
6. Verdict or finding of guilt signed by the Court and filed June 7, 1944.

[fols. 53-54] 7. Judgment—(with terms of sentence) Defendant committed to the custody of the Attorney General for a period of three (3) years, sentence to run concurrently with sentence imposed in Case No. 14475, Criminal entered June 7, 1944.

8. Notice of appeal filed June 8, 1944.

Date June 8, 1944.

Attest W. B. Wilson, Clerk.

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[The assignments of error in case No. 14476 are identical with the assignments of error in case No. 14475, which appear at page 32.]

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[The request for transcript of record is identical with the request for transcript of record in case No. 14475, which appears at page 34.]

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[The stipulation and order re bill of exceptions are identical with the stipulation and order re bill of exceptions in case No. 14475, which appear at page 35.]

[The stipulation re transcript of proceedings on June 7, 1944, is identical with the stipulation re transcript of proceedings in case No. 14475, which appears at page 36.]

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[The reporter's transcript of proceedings June 7, 1944, is identical with the transcript of proceedings in case No. 14475, which appears at page 36.]

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Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 55] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

No. 14477, Criminal

UNITED STATES OF AMERICA, Plaintiff,

v.

HEBER KIMBALL CLEVELAND, Defendant

INDICTMENT—Filed March 6, 1944

The grand jurors for the United States of America impaneled and sworn in the District Court of the United States for the Central Division of the District of Utah at the November term of said court in the year 1943, and inquiring for said District of Utah, upon their oath present:

First Count

That heretofore, to-wit, on the 9th day of August, 1942, at Salt Lake City in the Central Division of the District of Utah, one Heber Kimball Cleveland alias Fred Cleveland, hereinafter called defendant, unlawfully and feloniously, by means of automobile transportation, to-wit, 1936 Packard Sedan, Motor No. X33038, did knowingly transport, cause to be transported and knowingly aid and assist in obtaining transportation for and in transporting a certain woman, to-wit: Marie Beth Barlow, from Salt Lake City in the Central Division of the District of Utah to Grand Junction

in the District of Colorado, then and there for the purpose of debauchery and for a further immoral purpose, to-wit, that the aforesaid woman should be and become his mistress and concubine; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

[fol. 56] Second Count

And the grand jurors aforesaid, upon their oath as aforesaid, do further present:

That heretofore, to-wit, on the 12th day of October, 1942, at Salt Lake City in the Central Division of the District of Utah, one Heber Kimball Cleveland alias Fred Cleveland hereinafter called defendant, unlawfully and feloniously, by means of automobile transportation, to-wit, 1936 Packard Sedan, Motor No. X33083, did knowingly transport, cause to be transported and knowingly aid and assist in obtaining transportation for and in transporting a certain woman, to-wit, Marie Beth Barlow, from Salt Lake City in the Central Division of the District of Utah to Grand Junction in the District of Colorado, then and there for the purpose of debauchery and for a further immoral purpose, to-wit, that the aforesaid woman should be and become his mistress and concubine; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Third Count

And the grand jurors aforesaid, upon their oath as aforesaid, do further present:

That heretofore, to-wit, on the 5th day of December, 1942, at Salt Lake City in the Central Division of the District of Utah, one, Heber Kimball Cleveland, alias Fred Cleveland, hereinafter called defendant, unlawfully and feloniously, by means of automobile transportation, to-wit, Denver & Rio Grande train, did knowingly transport, cause to be transported and knowingly aid and assist in obtaining transportation for and in transporting a certain woman, to-wit, Kathryn Lucy Collinwood, from Salt Lake City in the Central Division of the District of Utah to Grand Junction in the District of Wyoming, then and there for the purpose of debauchery and for a further immoral purpose, to-wit, that

the aforesaid woman should be and become his mistress and [fol. 57] concubine; contrary to the statute in such case made and provided and against the peace and dignity of the United States of America.

A True Bill:

Don Clyde, Foreman of the Grand Jury.

Dan B. Shields, United States Attorney.

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[The motion to quash true bill is identical with the motion to quash in case No. 14475, which appears at page 2.]

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[The minute entry of March 20, 1944, is identical with the minute entry in case No. 14475, which appears at page 7.]

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[The stipulation of facts is identical with the statement of facts in case No. 14475, which appears at page 7.]

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[The minute entry of March 21, 1944, is identical with the minute entry in case No. 14475, which appears at page 13.]

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[The reporter's transcript March 21, 1944, is identical with the reporter's transcript in case No. 14475, which appears at page 13.]

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[The motion for verdict for defendant is identical with the motion for verdict for defendant in case No. 14475, which appears at page 14.]

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[fol. 58] [The minute entry of March 22, 1944, is identical with the minute entry in case No. 14475, which appears at page 15.]

[The memorandum opinion is identical with the memorandum opinion in case No. 14475, which appears at page 15.]

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[The minute entry of May 22, 1944, is identical with the minute entry in case No. 14475, which appears at page 27.]

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IN UNITED STATES DISTRICT COURT

VERDICT BY THE COURT—Filed June 7, 1944

The above named defendant in open court having waived a trial by jury and having consented that said cause may be tried before this Court without a jury upon a written stipulation of facts which has heretofore been submitted to this Court, and briefs having been filed by counsel for the United States of America, and by counsel for the defendant herein, and the matter having been taken under advisement, and the Court having considered the evidence introduced by such stipulations and having also considered the briefs of counsel filed as aforesaid, and the matter having been given due consideration, now,

Therefore, I, T. Blake Kennedy, District Judge sitting within and for the District of Utah, do hereby find the Defendant Heber Kimball Cleveland, guilty on Count One, guilty on Count Two, and guilty on Count Three, as charged in the Indictment herein.

Dated: June 7, 1944.

T. Blake Kennedy, United States District Judge
Sitting within and for the District of Utah.

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[fol. 59] IN UNITED STATES DISTRICT COURT

MINUTE ENTRY—June 7, 1944

On this 7th day of June, 1944, plaintiff appearing by John S. Boyden, Assistant United States Attorney, and Defendant Cleveland appearing in person and by Claude T. Barnes, J. H. McKnight, and Knox Patterson, his at-

torneys. The Court declared Defendant Cleveland guilty and the following verdict was signed and filed in open court:

[The verdict appears at page 58.]

The said defendant was asked if he had any reason to show why sentence should not be pronounced, and no reason being shown, the court ordered Defendant Cleveland committed to the custody of the Attorney General for imprisonment in an institution to be designated by the Attorney General for a period of one year and one day on each of the three counts, sentence to run concurrently as to counts, and sentence to run consecutively to the one imposed in case No. 14475 and 14476, Criminal. Judgment and commitment signed by the court and entered herein. The court fixed the appeal bond in the sum of $4000.00, and ordered the bond approved by the clerk. Defendant ordered committed to the custody of the United States Marshal until said bond was approved.

It was further ordered that a certain portion of the court reporter's transcript, wherein said defendant stated in open court that jury proceedings would be waived, together with all proceedings taken this day, be transcribed by the court reporter and same to be included in the record of appeal.

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IN UNITED STATES DISTRICT COURT

No. 14477

UNITED STATES

v.

HEBER KIMBALL CLEVELAND

JUDGMENT AND COMMITMENT

On this 7th day of June, 1944, came the United States Attorney, and the defendant Heber Kimball Cleveland appearing in proper person, and with counsel and,

The defendant having been convicted on verdict of the Court of the offense charged in the Indictment in the above-entitled cause, to-wit:

[fol. 60] Vio. U. S. C. Title 18, Sec. 398—Mann Act

and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of

—One (1) year and One (1) day on each of the three counts, sentence to run concurrently as to counts, and sentence to run consecutively to the one imposed in Case No. 14475, and 14476, Criminal—

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

T. Blake Kennedy, United States District Judge.

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Summary of Bond

Bond in sum of $4,000.00, Sylvia G. Michels and Althea F. Beagley as sureties, approved by Clerk and filed June 7, 1944.

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In United States District Court

Notice of Appeal—Filed June 8, 1944

Heber Kimball Cleveland, 1361 So. 9th East, Salt Lake City, Utah, Appellant.

Joseph H. McKnight, Atlas Block, Salt Lake City, Utah, Claude T. Barnes, 614 First Nat'l Bank Bldg., Salt Lake City, Utah, Knox Patterson, Boston Building, Salt Lake City, Utah, Attorneys for Appellants.

Offense: Vio. Sec. 398, T. 18, U. S. C.: Mann Act Brief description of judgment and sentence:

[fol. 61] One (1) year and One (1) day on each of the three counts, sentence to run concurrently as to counts, and sen-

tence to run consecutively to the one imposed in Case Nos. 14475 and 14476, Criminal

Name of prison where now confined, if not on bail:

Defendant is Now on Bail

I, the above named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Tenth Circuit from the judgment above mentioned on the grounds set forth below.

Heber Kimball Cleveland, Appellant.

Dated June 7th, 1944.

(a) The Court erred in its failure and refusal to grant the defendant's motion to quash the information in said cause.

(b) The judgment is against law and the evidence.

(c) The statute is not applicable to the facts.

(d) The judgment violates the right of the defendant to the free exercise of religious belief, under the Constitution of the United States, and the Treaty of Guadalupe Hidalgo.

(e) The facts show no intent to violate the statutes; and show only an offense against state statutes.

(f) There is no proof of immorality; no proof of debauchery, lasciviousness, indecency or lewdness, or proof of any act against peace and good order, or against good morals.

Rec'd copy June 8, 1944.

John S. Boyden, Asst. U. S. Atty.

[fol. 62] IN UNITED STATES DISTRICT COURT

No. 14477, Criminal

UNITED STATES OF AMERICA

vs.

HEBER KIMBALL CLEVELAND

FORM OF CLERK'S STATEMENT OF DOCKET ENTRIES TO BE FORWARDED UNDER RULE IV

1. Indictment for violation of Section 398, Title 18, U. S. C. A.—Mann Act (3 Counts) filed March 6, 1944.

2. Arraignment March 7, 1944.

3. Plea to indictment of "Not Guilty" entered on March 20, 1944.

4. Motion to withdraw plea of guilty denied —, 19—.

5. Trial by court if jury waived March 21, 1944.

6. Verdict or finding of guilt signed by the Court and filed June 7, 1944.

7. Judgment—(with terms of sentence) Defendant committed to the custody of the Attorney General for a period of one (1) year and one (1) day on each of the three counts, sentence to run concurrently as to counts, and sentence to run consecutively to the one imposed in Case No. 14475 and 14476 entered June 7, 1944.

8. Notice of appeal filed June 8, 1944.

Date June 8, 1944.

Attest W. B. Wilson, Clerk.

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[The assignments of error are identical with the assignments of error in case No. 14475, which appear at page 32.]

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[The request for transcript of record is identical with the request for transcript of record in case No. 14475, which appears at page 34.]

[fols. 63-64] [The stipulation and order re bill of exceptions are identical with the stipulation and order re bill of exceptions in case No. 14475, which appear at page 35.]

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[The stipulation re transcript of proceedings on June 7, 1944, is identical with the stipulation re transcript of proceedings in case No. 14475, which appears at page 36.]

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[The reporter's transcript of proceedings June 7, 1944, is identical with the transcript of proceedings in case No. 14475, which appears at page 36.]

* * * * * * *

Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 65] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

* * * * * * *

No. 14478 Criminal

UNITED STATES OF AMERICA, Plaintiff

v.

DAVID BRIGHAM DARGER, Defendant

INDICTMENT—Filed March 6, 1944

The grand jurors for the United States of America impaneled and sworn in the District Court of the United States for the Central Division of the District of Utah at the November term of said court in the year 1943, and inquiring for said District of Utah, upon their oath present:

That heretofore, to-wit, on or about the 17th day of July, 1942, at Salt Lake City in the Central Division of the District of Utah, one David Brigham Darger hereinafter called defendant, unlawfully and feloniously, by means of automobile transportation, to-wit, 1940 Willys Sedan, Motor

Number 42050, did knowingly transport, cause to be transported and knowingly aid and assist in obtaining transportation for and in transporting a certain woman, to-wit, Jean Barlow, from Grand Junction, Colorado, to Salt Lake City in the Central Division of the District of Utah, then and there for the immoral purpose that the aforesaid woman should be and live with him as his mistress and concubine; contrary to the form of the statute in such case made [fol. 66] and provided and against the peace and dignity of the United States of America.

A True Bill:

Don Clyde, Foreman of the Grand Jury. Dan B. Shields, United States Attorney.

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IN UNITED STATES DISTRICT COURT

MINUTE ENTRY—March 20, 1944

On this 20th day of March, 1944, plaintiff appearing by John S. Boyden, Assistant United States Attorney, and defendant in person, and by Claude T. Barnes, Knox Patterson and J. H. McKnight, his attorneys, Defendant Darger was arraigned, gave his true name as charged, waived reading to him of the indictment, and entered his plea of not guilty. Case ordered continued until March 21st, for further proceedings.

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IN THE UNITED STATES DISTRICT COURT

MINUTE ENTRY—March 21, 1944

On this 21st day of March, 1944, come again said parties by their respective attorneys as aforesaid, and Defendant Darger in person, and said defendant consented that case might be tried on stipulation of facts and jury expressly waived. Ordered that further hearing be continued until March 22, 1944.

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IN THE UNITED STATES DISTRICT COURT

PORTION OF REPORTER'S TRANSCRIPT—March 21, 1944

Mr. Boyden: David Brigham Darger.

Mr. Darger, you are the defendant in case No. 14,478?

Mr. Darger: I think so.

Mr. Boyden: And is it agreeable with you that your case might be submitted on the stipulation that is entered into by counsel for you?

Mr. Darger: Yes, sir.

[fol. 67] Mr. Boyden: And do you hereby expressly waive a jury and consent that the court might try the case on that stipulation of facts?

Mr. Darger: Yes, sir.

Certificate

I hereby certify that the within pages numbered from 1 to 3, inclusive, contain a true and correct transcript of my shorthand notes of the within proceedings had in said case on March 21, 1944.

E. M. Garnett, Official Reporter.

Filed June 16, 1944.

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In the United States District Court

Stipulation of Facts—Filed March 21, 1944

Come now parties in the above entitled action, United States of America by Dan B. Shields, United States Attorney, and John S. Boyden, Assistant United States Attorney, the defendant David Brigham Darger by J. H. McKnight, Claude T. Barnes, and Knox Patterson, Attorneys-at-law, and stipulate that the above entitled cases may be tried before the Court sitting without a jury upon the following statement of testimony, which would, were it not for this stipulation, be introduced by the government.

That David Brigham Darger was married to Aldora McDaniel on May 13, 1926, at Salt Lake City, Utah, and that he remained her lawful wedded husband until the granting of his divorce at Las Vegas, Nevada, on the 16th day of April, 1943.

That during the month of July, 1942, the defendant had two plural wives, in addition to his lawful wife, with whom he had gone through a religious ceremony known in the religious cult of Fundamentalists as plural or celestial marriage, and which the said defendant claimed to be based upon the original concepts of the Mormon Church.

That plural marriages were unlawful under the laws of the states of Utah and Colorado.

That for some time prior to July 17, 1942, the defendant [fol. 68] had been working as a contractor in Grand Junc-

tion, Colorado, and living there as man and wife with Jean Barlow, one of his plural wives.

That on said 17th day of July, 1942, defendant, with said Jean Barlow, went to the home of Heber Kimball Cleveland in said Grand Junction, and in the presence of Cathryn Lucy Collinwood defendant discussed plural marriage with said Herber Kimball Cleveland, at which time the said Cleveland promised the defendant that he should have the six-day-old female baby of Cleveland as his plural wife when said baby reached fourteen years of age.

That on said 17th day of July, 1942, said David Brigham Darger transported said Jean Barlow by automobile transportation from Grand Junction, Colorado, to Salt Lake City, Utah, where he lived with Jean Barlow, Beth McDaniel and Aldora McDaniel in a state of plural marriage.

Thereafter the defendant returned to Grand Junction for a short time on contract work before returning to Salt Lake to again resume living with said three women.

On December 2, 1942, at Salt Lake City, defendant wrote to Heber Kimball Cleveland, referring to the baby he had been promised in marriage, as follows:

"I drop in often to see them, and Angel blue eyes, she loves me and lets me know it. And I do love her! She is a very great joy to look forward to having some day."

Dan B. Shields, United States Attorney. John S. Boyden, Assistant United States Attorney. Claude T. Barnes, J. H. McKnight, Knox Patterson, Attorneys for defendant.

Dated this 21st day of March, 1944.

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[fol. 69] IN UNITED STATE DISTRICT COURT

MOTION TO QUASH TRUE BILL—Filed March 22, 1944

Comes now the defendant, David Brigham Darger, by his counsel and respectfully moves the court to quash each and every count of the alleged True Bill in the above entitled matter, for the reasons and upon the grounds:

I

That said True Bill does not state an offense against the laws of the United States, and in particular does not state an offence under Section 398-T 18 USCA Mann Act.

II

That the court is without jurisdiction to try the alleged charge set forth in said alleged True Bill.

III

That the formation and composition of the grand jury which presented the alleged True Bill to this court was and is illegal and void; that the grand jury finding said alleged True Bill, and each member thereof, by reason of bias and prejudice had against this defendant at the time of convening and finding said alleged True Bill, was disqualified under the laws of the United States and of the State of Utah, to sit as grand jurors in this matter, and by reason thereof the substantial rights of this defendant have been impaired and he cannot safely go to trial under said alleged True Bill, and the defendant respectfully requests the court to open up the proceedings of said grand jury for inspection and investigation and to permit such further proceedings as may be justified in support of this assignment.

This assignment is supported by the challenge to the grand jury and statement of facts contained therein, a copy of which is hereto attached and made a part of this Motion to Quash.

J. H. McKnight, Knox Patterson, Attorneys for Defendant.

[fol. 70] Certificate of Merit

We, the undersigned, attorneys for the defendant above named, hereby certify that in our opinion the foregoing Motion to Quash True Bill is meritorious and that the same is not filed for the purpose of delaying any proceedings. Dated this 21 day of March, 1944.

J. H. McKnight, Knox Patterson, Attorneys for Defendant.

Challenge to Grand Jury Panel

Challenge to Don Clyde, Foreman of the Grand Jury in particular, the only member of the grand jury to these movants known by name or identity, and to the panel of the Grand Jury generally.

Comes now each of the defendants in the several cases numbered above, and in each of said criminal causes and

severally in each case by the defendants therein named, makes challenge to the grand jury which brought the True Bill forming the foundation for the criminal actions above numbered; said challenge being to the grand jury and the entire panel thereof whose names, other than the name of Don Clyde, the foreman of said jury, are unknown to said defendants or any of them, and particularly and specifically makes challenge to said named foreman of said grand jury, Don Clyde.

For grounds of said challenge and challenges and each of the same, both as to said particularly named juror and as to the panel as a whole, these defendants in said respective above numbered actions will rely upon the files and the records, the minutes of the above entitled court, the files and the records of the grand jury aforesaid and the laws of the United States of America applying and the laws of the State of Utah having application, and the minutes of the above entitled court and the following statement of facts and the affidavits hereto attached, viz:

[fol. 71] Statement of Facts

Don Clyde, the grand juror who signed each one and all of the True Bills upon which the above numbered criminal actions are based, is not and was not at any time from the commencement to the termination of the convening of said grand jury in which said True Bills were returned, an eligible juror as provided by law in the following particulars, to-wit:

Said Don Clyde at all said times and for a long time prior thereto has been and was an active member of the dominant church and a member of the high priesthood quorums thereof, and in particular the First Councillor to the said President of the Wasatch Stake of Zion of said dominant Mormon church, in which said dominant Mormon Church a state of Zion corresponds in large degree to a Roman Catholic Diocese and in which the said Presidency, headed by the said President, supplemented and assisted and in cooperation with and by a first and a second councillor, make up and constitute the supreme governing body of such stake, and as such is subject only to higher and general authorities of said church for complete control of the teachings and exposition of the doctrines of said dominant church within said stake or diocese.

These defendants verily believe and so state that said Don Clyde has occupied a dominant presiding position among the high priest quorums of said dominant Mormon Church for a period of approximately twenty years, and as such is required by his duties, in said dominant church to be in attendance personally at all the general semi-annual conferences of said church and general convocations of the leading priesthood quorums of said church held semi-annually each year over said twenty years and so these defendants allege on their information and belief that the said Don Clyde was personally in attendance at that certain session of the semi-annual conference of said dominant Mormon Church held at Salt Lake City in the month of April, A. D., 1931, at which the following resolution was adopted by unanimous vote of all the persons in attendance thereat, and the vote of the priesthood and priesthood quorums of said church being particularly noted as being [fol. 72] the first whose hands were raised in support of said resolution. A copy of said resolution so voted for and adopted at said conference is hereinafter set forth viz.:

"We have been, however, and we are entirely willing And Anxious, Too, that such offenders against the law of the State (those living in plural marriage) should be dealt with and punished as the law provides. We have been and we are willing to give such Legal Assistance as we legitimately can in the Criminal Prosecution of such cases. We are willing to go to such limits not only because we regard it as our duty as citizens of the country to assist in the enforcement of the law and the suppression of pretended "plural marriages," but also because we wish to do everything humanly possible to make our attitude toward this matter so clear, definite and unequivocal as to leave no possible doubt of it in the mind of any person. * * * I would like all those in this congregation who feel to sustain this statement that I have read to you to manifest it as the Apostles and All of the General Authorities have done, by raising their right hands."

(The Congregation responded by raising their hands.)

"I have never seen such a lot of hands held so high in my life.

"All those who are opposed to this statement will please raise their hands.

(No hand was raised.)

"Our enemies (those believing in the principle of celestial or plural marriage) do not seem to be here."

(Brackets ours.)

These defendants further allege on their information and belief that if said Don Clyde in fact was not in personal attendance and did not so personally vote to adopt said resolution aforesaid, that he, by reason of his priestly office and his adherence to the doctrines, hearings and resolutions of said dominant church nevertheless has adopted and made such resolution a part of his personal religion and belief, and is bound thereby and under the same is and has been at all of the times herein mentioned, in religious attitude [fol. 73] bound to act against all persons charged with any violation in teaching or in belief or in practice, one or the other or all, of the Mormon dominant church revealed doctrine of celestial marriage.

These defendants allege that as a matter of practice in said dominant church, at all of the times herein mentioned and since the year 1931, any member of a high priesthood quorum of said dominant church opposed to or opposing, or failing to accept and wholeheartedly embrace and be bound by said resolution in his private and public acts, if the same became known to the authorities of said church, has been relieved of his office in such priestly quorum.

That each one of the defendants in the above numbered criminal actions in this court, by reason of their belief in and open advocation of the doctrine of celestial marriage, as originally revealed to the Prophet Joseph Smith, the founder of said dominant Mormon Church, in the same manner and in the same voice as it is recorded in 22d Chapter of the Acts of the Apostles that St. Paul was instructed, not as the word of man or as any resolution adopted by any convocation of the membership or the priesthood of said dominant church or any church, or any convocation of the original twelve Apostles; and by reason of their open advocation of the said revealed word of God on the subject of polygamy so had as aforesaid, and believing and teaching the same, and by reason of said resolution hereinabove set forth

as annunciative of the present tenet and belief and requirement of belief of the members of the dominant church, and a violation of said resolution, each and all of these defendants has been excommunicated from said dominant church.

By reason of the facts aforesaid, these defendants justly and properly believe and so allege that said Don Clyde, foreman of said grand jury, could not divorce himself from his belief and religious convictions and is bounden as his duty to persecute and prosecute and bring to trial any person charged by one or more of his brother priests with expounding, teaching or in any manner believing in or advocating the doctrine of polygamy, and so in his deliberations as such grand juror was inherently and continuously and oppres- [fol. 74] sively biased as against each of these defendants and that said bias and prejudice entered into his actions as a grand juror in each of the above numbered cases,

As to the balance of the men or women constituting said grand jury and each of the same, not one of these defendants has any knowledge as to identity, name or occupation, but each of the same having been drawn from within the State of Utah, these defendants allege that in all probability, as they verily believe, many if not in fact each one of the other grand jurors making up and constituting said grand jury are now and for more than twenty years have been continuously and were at the time of their sitting on such grand jury active members of said dominant church entirely conversant with the resolution of the April, 1931, conference aforesaid and bound thereby as was and is said Don Clyde as aforesaid; believe therein and their actions as such grand jurors were influenced and controlled thereby to the bias and prejudice both actual and implied of these defendants and each of them, and so these defendants allege, on information and belief, that as to each of the True Bills in each one of the above numbered criminal actions mentioned, not only Don Clyde, but all or nearly all of the members of said grand jury were biased in like manner and in complete degree as was the grand juror, Don Clyde, and that said bias and prejudice in the deliberations of said grand jury inured to the prejudice and damage of these charged defendants and was in violation of their lawful right to have their matters, as nearly as may be and the charges of the same, considered by an impartial, fair-minded grand jury.

These defendants allege, upon their complete belief, owing largely to the adoption of the resolution hereinabove set

forth, that each one and all of the purported facts laid before said grand jury for its deliberation, and all testimony and documentary evidence supplied and given to said grand jury in each of these matters, was so supplied and given to said grand jury in every instance by members of the dominant Mormon church, either by its priesthood or its devout laity, whose testimony under oath would be received by each one and all of the said grand jurors as the absolute truth [fol. 75] and completely unimpeachable and binding upon said grand jurors without any detailed or particular investigation or questioning thereof or as to the same, its sources or imports, and so these defendants allege that said grand jury session was not and could not in its nature be such an inquiry by a proper and impartial grand jury as is contemplated by law, but was in truth and in fact an inquisition designed and intended and instituted to humiliate, harass, destroy and punish each one of these defendants by reason of his religious differences in dogma and belief with said grand jurors and said witnesses as to the fundamental, revealed doctrine of the Mormon Church as to celestial marriage, and so to destroy them utterly and prevent any further activity on their part.

Wherefore these defendants respectfully pray the court that an order of this court issue authorizing and directing these defendants, through their counsel, to thoroughly investigate the records of the grand jury and to introduce evidence of the matters in the foregoing statement of facts set forth and take such other and further proceedings as seems meet in the premises; that defendants further pray that, in the event no denial be filed to the charges made in this challenge, that the court record the same as true and immediately enter its order quashing each one and all of said True Bills.

Claude T. Barnes, J. H. McKnight, Knox Patterson,
Attorneys for Defendants.

STATE OF UTAH,
County of Salt Lake, ss:

William E. Chatwin, Charles F. Zitting, Edna Christensen, David Brigham Darger, Follis Gardner Petty, Vergel Y. Jessop, Theral Dockstader, L. R. Stubbs, each for himself being first duly sworn, deposes and says: That he is one of the defendants named in the foregoing challenge and state-

ment of fact; that he has read the same and knows the contents thereof and that the same is true of his own knowledge [fol. 76] except as to matters therein stated on information and belief and as to all such things he believes it to be true.

William E. Chatwin, Charles F. Zitting, Edna Christensen, David Brigham Darger, Follis G. Petty, Vergel Y. Jessop.

Subscribed and sworn to before me this 21 day of March, 1944. Knox Patterson, Notary Public. Residing in Salt Lake City, Utah. My commission expires: 5/19/47.

CERTIFICATE OF MERIT

We, the undersigned, attorneys for the defendants above named, hereby certify that in our opinion the foregoing Challenge and Statement of Facts is meritorious and that the same is not filed for the purpose of delaying any proceedings.

Dated this 21 day of March, 1944.

Claude T. Barnes, J. H. McKnight, Knox Patterson, Attorneys for Defendants.

Filed March 22, 1944.

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[The motion for verdict for defendant is identical with the motion for verdict for defendant in case No. 14475, which appears at page 14.]

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IN UNITED STATES DISTRICT COURT

MINUTE ENTRY—March 22, 1944

On this 22nd day of March, 1944, come again said parties by their respective attorneys as aforesaid, and further hearing on this case was resumed. The court heard the arguments of counsel on defendant's motion to quash the indictment, and motion for verdict for defendant, and the motion to quash the indictment was overruled by the court, and ruling on motion for verdict was held in abeyance un- [fol. 77] til briefs are received by the court. Defendant granted until April 12th to submit its brief, and plaintiff until May 3rd and reply brief of defendant to be submitted

May 8th. All briefs to be lodged with the clerk and the clerk to forward same to Judge T. Blake Kennedy at Cheyenne, Wyoming, at which time the case will be taken under advisement.

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[The memorandum opinion is identical with the memorandum opinion in case No. 14475, which appears at page 15.]

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[The minute entry of May 22, 1944, is identical with the minute entry in case No. 14475, which appears at page 27.]

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IN UNITED STATES DISTRICT COURT

VERDICT BY THE COURT—Filed June 7, 1944

The above named defendant in open court having waived a trial by jury and having consented that said cause may be tried before this Court without a jury upon a written stipulation of facts which has heretofore been submitted to this Court, and briefs having been filed by counsel for the United States of America, and by counsel for the defendant herein, and the matter having been taken under advisement, and the Court having considered the evidence introduced by such stipulations and having also considered the briefs of counsel filed as aforesaid, and the matter having been given due consideration, now,

Therefore, I, T. Blake Kennedy, District Judge sitting within and for the District of Utah, do hereby find the defendant David Brigham Darger, guilty as charged in the Indictment herein.

Dated: June 7, 1944.

T. Blake Kennedy, United States District Judge Sitting within and for the District of Utah.

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[fol. 78] IN UNITED STATES DISTRICT COURT

MINUTE ENTRY—June 7, 1944

On this 7th day of June, 1944, plaintiff appearing by John S. Boyden, Assistant United States Attorney, and Defendant Darger appearing in person and by Claude T.

Barnes, J. H. McKnight and Knox Patterson, his attorneys. The Court declared Defendant Darger guilty, and the following verdict was signed and filed in open court:

[The verdict appears at page 77.]

The said defendant was asked if he had any reason to show why sentence should not be pronounced, and no reason being shown, the Court ordered Defendant Darger committed to the custody of the Attorney General for imprisonment for the period of three years in an institution to be so designated by the Attorney General. Judgment and Commitment signed by the Court and entered herein. The Court fixed the appeal bond in the sum of $3000.00, and ordered the bond approved by the Clerk. Defendant ordered committed to the custody of the United States Marshal until said bond was approved.

It was further ordered that a certain portion of the court reporter's transcript, wherein said defendant stated in open court that jury proceedings would be waived, together with all proceedings taken this day, be transcribed by the court reporter and same to be included in the record of appeal.

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IN UNITED STATES DISTRICT COURT

JUDGMENT AND COMMITMENT

On this 7th day of June, 1944, came the United States Attorney, and the defendant David Brigham Darger appearing in proper person, and with counsel and,

The defendant having been convicted on verdict of the Court of the offense charged in the indictment in the above-entitled cause, to-wit:

Vio. U. S. C. Title 18, Sec. 398—Mann Act

and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against , and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

[fol. 79] Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Three (3) Years.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

T. Blake Kennedy, United States District Judge.

SUMMARY OF BOND ON APPEAL

Bond in sum of $3,000.00, Pansy Darger and Celeste R. Darger as sureties, approved by Clerk and filed June 7, 1944.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed June 8, 1944

David Brigham Darger, 3744 South 9th East, Salt Lake City, Utah, Appellant.

Joseph H. McKnight, Atlas Block, Salt Lake City, Utah, Claude T. Barnes, 614 First Nat'l Bank Bldg., Salt Lake City, Utah, Knox Patterson, Boston Building, Salt Lake City, Utah, Attorneys for Appellant.

Offense: Vio. Sec. 398, T. 18, U. S. C.: Mann Act.

Brief description of judgment or sentence: Three years.

Name of Prison where now confined, if not on bail: Defendant is now on bail.

I, the above named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Tenth Circuit from the judgment above mentioned on the grounds set forth below.

David B. Darger, Appellant.

Dated June 7th, 1944.

[fol. 80] Grounds of Appeal:

(a) The Court erred in its failure and refusal to grant the defendant's motion to quash the information in said cause.

(b) The judgment is against law and the evidence.

(c) The statute is not applicable to the facts.

(d) The judgment violates the right of the defendant to the free exercise of religious belief, under the Constitution of the United States, and the Treaty of Guadalupe Hidalgo.

(e) The facts show no intent to violate the statute; and show only an offense against state statutes.

(f) There is no proof of immorality; no proof of debauchery, lasciviousness, indecency or lewdness, or proof of any act against peace and good order, or against good morals.

Rec'd copy June 7, 1944.

John S. Boyden, Asst. U. S. Atty.

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In United States District Court

Form of Clerk's Statement of Docket Entries to Be Forwarded under Rule IV

No. 14478, Criminal

United States of America

vs.

David Brigham Darger

1. Indictment for violation of Section 398, Title 18, U. S. C. A.—Mann Act filed March 6, 1944.

2. Arraignment March 7, 1944.

3. Plea to indictment of 'Not Guilty' entered on March 20, 1944.

4. Motion to withdraw plea of guilty denied —, 19—.

5. Trial by court if jury waived March 21, 1944.

6. Verdict or finding of guilt signed by the Court and filed June 7, 1944.

7. Judgment—(with terms of sentence) Defendant com-
[fol. 81] mitted to the custody of the Attorney General for imprisonment for a period of three (3) years entered June 7, 1944.

8. Notice of appeal filed June 8, 1944.

Dated June 8, 1944.

Attest W. B. Wilson, Clerk.

[The assignments of error are identical with the assignments of error in case No. 14475, which appear at page 32.]

## In United States District Court

### Praecipe for Transcript of Record—Filed June 21, 1944

To the Clerk, District Court of the United States for the District of Utah in and for the Central Division:

The appellant, David Brigham Darger, hereby directs that in preparing the transcript of the record in this cause in the District Court of the United States for the District of Utah, you include the following:

1. Indictment.
2. Stipulation of Facts.
3. Minute Entry of March 20, 1944.
4. Minute Entry of March 21, 1944.
5. Challenge of Defendant of Grand Jury Panel.
6. Motion to Quash.
7. Motion for Verdict for Defendant.
8. Minute Entry of March 22, 1944.
9. Memorandum Opinion.
10. Judgment of Guilty.
11. Judgment Entry of June 7, 1944.
12. Reporter's Transcript of Proceedings of June 7, 1944.
13. Notice of Appeal.

[fols. 82-84] 14. Clerk's Statement of Docket.

15. Statement of Clerk that Defendant on Bond.
16. Assignment of Errors.
17. Copy of this Praecipe.

Claude T. Barnes, J. H. McKnight, Knox Patterson, Attorneys for Defendant.

Received copy this 21st day of June, 1944.

Dan B. Shields, United States Attorney; John S. Boyden, Assistant United States Attorney.

[The stipulation and order re bill of exceptions are identical with the stipulation and order re bill of exceptions in case No. 14475, which appear at page 35.]

[The stipulation re transcript of proceedings on June 7, 1944, is identical with the stipulation re transcript of proceedings in case No. 14475, which appears at page 36.]

[The reporter's transcript of proceedings June 7, 1944, is identical with the transcript of proceedings in case No. 14475, which appears at page 36.]

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Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 85] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

No. 14480, Criminal

UNITED STATES OF AMERICA, Plaintiff,

v.

VERGEL Y. JESSOP, Defendant

INDICTMENT—Filed March 6, 1944

The grand jurors for the United States of America impaneled and sworn in the District Court of the United States for the Central Division of the District of Utah at the November term of said court in the year 1943, and inquiring for said District of Utah, upon their oath present:

That heretofore, to-wit, on the 10th day of July, 1943, at Short Creek in the Central Division of the District of Utah, one Vergel Y. Jessop, hereinafter called Defendant, unlawfully and feloniously, by means of automobile transportation, to-wit, 1936 Chevrolet Pickup Truck, Motor No. K6621218, did knowingly transport, cause to be transported, and knowingly aid and assist in obtaining transportation for and in transporting a certain woman, to-wit, Mae Johnson, from Short Creek in the Central Division of the District of Utah, to Short Creek in the District of Arizona, then and there for the purpose of debauchery and for a further immoral purpose, to-wit, that the aforesaid woman should be and become his mistress and concubine; contrary [fol. 86] to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

A True Bill.

Don Clyde, Foreman of the Grand Jury.

Dan B. Shields, United States Attorney.

IN UNITED STATES DISTRICT COURT

MINUTE ENTRY—March 20, 1944

On this 20th day of March, 1944, plaintiff appearing by John S. Boyden, Assistant United States Attorney, and defendant in person, and by Claude T. Barnes, Knox Patterson and J. H. McKnight, his attorneys. Defendant Jessop was arraigned, gave his true name as charged, waived reading to him of the indictment and entered his plea of not guilty. Case ordered continued until March 21st for further proceedings.

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IN UNITED STATES DISTRICT COURT

MINUTE ENTRY—March 21st, 1944

On this 21st day of March, 1944, come again said parties by their respective attorneys as aforesaid, and Defendant Jessop in person, and said defendant consented that case might be tried on stipulation of facts and jury expressly waived. Ordered that further hearing be continued until March 22, 1944.

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IN UNITED STATES DISTRICT COURT

PORTION OF REPORTER'S TRANSCRIPT—March 21, 1944

Mr. Boyden: Vergel Y. Jessop.

Mr. Jessop, you are the defendant in Case No. 14480?

Mr. Jessop: Yes, sir.

Mr. Boyden: And do you now consent that your case might be tried on the stipulation of your counsel?

Mr. Jessop: Yes, sir.

[fol. 87] Mr. Boyden: And that the case might be tried by the court sitting without a jury, and do you expressly hereby waive a jury trial?

Mr. Jessop: Yes, sir.

CERTIFICATE

I certify that the within pages numbered from 1 to 3, inclusive, contain a true and correct transcript of my shorthand notes of the within proceedings had in said case on March 21, 1944.

E. M. Garnett, Official Reporter.

Filed June 16, 1944.

## In United States District Court

### Stipulation of Facts—Filed March 21, 1944

Come now parties in the above entitled action, United States of America by Dan B. Shields, United States Attorney, and John S. Boyden, Assistant United States Attorney, the defendant Vergel Y. Jessop, by J. H. McKnight, Claude T. Barnes, and Knox Patterson, Attorneys-at-Law, and stipulate that the above entitled case may be tried before the Court sitting without a jury upon the following statement of testimony, which would, were it not for this stipulation, be introduced by the government:

That Vergel Y. Jessop, the defendant herein, was married on the 10th day of December, 1926, at Salt Lake City, to Verna Spencer, who was 16 years of age, and still is the lawful husband of said Verna Spencer and they have nine children issue of said marriage.

That in August, 1940, Mae Johnson, then a 15 year old girl, went to the home of defendant and Mrs. Jessop, who is a double cousin of said Mae Johnson, to assist with the housework.

That defendant discussed plural marriage with said Mae Johnson who agreed with the principle and defendant thereafter entered into the religious ceremony of the Fundamentalists with said Mae Johnson in January of 1941.

Defendant contends that the Fundamentalists believe in the original teachings and doctrines of the Mormon Church. [fol. 88] That prior to said ceremony defendant courted said Mae Johnson openly before his own wife and children, thereby causing some domestic difficulties.

That after said plural marriage the defendant simultaneously operated two households in various places. That in the month of July, 1943, said Mae Johnson was living in a house provided for her by defendant at Short Creek, Utah, and at the same time his legal wife Verna Spencer Jessop was residing at the house provided for her by defendant in Short Creek, Arizona, that said houses were about two miles apart.

That on or about the 10th day of July, 1943, Verna Spencer Jessop temporarily left her residence at Short Creek, Arizona; that immediately thereafter said defendant, in his 1936 Chevrolet pick-up truck, Motor No. K-6621218, transported said Mae Johnson from Short Creek, Utah, to Short

Creek, Arizona, where he lived with said Mae Johnson as man and wife for a period of approximately one week, during which week the children of defendant by his legal wife Verna Spencer Jessop, witnessed said defendant in bed with said Mae Johnson.

That said defendant has had one child by said Mae Johnson, born April 7, 1943.

Dan B. Shields, United States Attorney. John S. Boyden, Assistant United States Attorney. Claude T. Barnes, J. H. McKnight, Knox Patterson, Attorneys for defendant.

Dated this 21st day of March, 1944.

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[fol. 89] IN UNITED STATES DISTRICT COURT

MOTION TO QUASH TRUE BILL

Comes now the defendant, Vergel Y. Jessop, by his counsel and respectfully moves the court to quash each and every count of the alleged true bill in the above entitled matter, for the reasons and upon the grounds:

[The grounds set out in the motion to quash and the challenge to the grand jury panel are identical with the grounds and the challenge in case No. 14478, pages 69 and 70.]

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[The motion for verdict for defendant is identical with the motion for verdict for defendant in case No. 14475, which appears at page 14.]

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[The minute entry March 22, 1944, re argument on motion to quash etc. is identical with the minute entry in case No. 14478, which appears at page 76.]

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[The memorandum opinion is identical with the memorandum opinion in case No. 14475, which appears at page 15.]

[The minute entry of May 22, 1944, is identical with the minute entry in case No. 14475, which appears at page 27.]

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IN UNITED STATES DISTRICT COURT

VERDICT BY THE COURT—Filed June 7, 1944

The above named defendant in open court having waived a trial by jury and having consented that said cause may be tried before this Court without a jury upon a written stipulation of facts which has heretofore been submitted to this Court, and briefs having been filed by counsel for the United States of America, and by counsel for the defendant herein, and the matter having been taken under advisement, and the Court having considered the evidence introduced by such stipulations and having also considered the briefs of counsel filed as aforesaid, and the matter having been given due consideration, now,

[fol. 90] Therefore, I, T. Blake Kennedy, District Judge sitting within and for the District of Utah, do hereby find the Defendant Vergel Y. Jessop guilty as charged in the Indictment herein.

Dated: June 7, 1944.

T. Blake Kennedy, United States District Judge, Sitting Within and For the District of Utah.

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IN UNITED STATES DISTRICT COURT

MINUTE ENTRY—June 7, 1944

On this 7th day of June, 1944, plaintiff appearing by John S. Boyden, Assistant United States Attorney, and Defendant Jessop appearing in person and by Claude T. Barnes, J. H. McKnight and Knox Patterson, his attorneys. The Court declared Defendant Jessop guilty, and the following verdict was signed and filed in open Court:

[The verdict appears at page 89.]

The said defendant was asked if he had any reason to show why sentence should not be pronounced, and no reason being shown, the Court ordered Defendant Jessop committed to the custody of the Attorney General for imprisonment for the period of three years in an institution to be

designated by the Attorney General. Judgment and Commitment signed by the Court and entered herein. The Court fixed the appeal bond in the sum of $3000.00, and ordered the bond approved by the Clerk. Defendant ordered committed to the custody of the United States Marshal until said bond was approved.

It was further ordered that a certain portion of the court reporter's transcript, wherein said defendant stated in open court that jury proceedings would be waived, together with all proceedings, taken this day, be transcribed by the court reporter and same to be included in the record of appeal.

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[fol. 91] IN UNITED STATES DISTRICT COURT

JUDGMENT AND COMMITMENT

On this 7th day of June, 1944, came the United States Attorney, and the defendant Vergel Y. Jessop appearing in proper person, and with counsel and,

The defendant having been convicted on verdict of the Court of the offense charged in the indictment in the above-entitled cause, to-wit: Vio. U. S. C. Title 18, Sec. 398—Mann Act; and the defendant having been now asked whether he has anything to say; why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Three (3) Years.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

T. Blake Kennedy, United States District Judge.

SUMMARY OF BOND ON APPEAL

Bond in the sum of $3,000.00, Rula K. Broadbent and Jess N. Beagley as sureties, approved by the clerk and filed June 7, 1944.

## In United States District Court

### Notice of Appeal—Filed June 8, 1944

Vergel Y. Jessop, Short Creek, Arizona, Appellant. Joseph H. McKnight, Atlas Block, Salt Lake City, Utah, Claude T. Barnes, 614 First Nat'l Bank Bldg., Salt Lake City, Utah, Knox Patterson, Boston Building, Salt Lake City, Utah, Attorneys for Appellants.

[fol. 92] Offense: Vio. Sec. 398, T. 18, U.S.C.: Mann Act.

Brief description of judgment or sentence: Three years.

Name of prison where now confined, if not on bail: Defendant is now on bail.

I, the above named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Tenth Circuit from the judgment above mentioned on the grounds set forth below.

Vergel Y. Jessop, Appellant.

Dated June 7th, 1944.

Grounds of appeal:

(a) The Court erred in its failure and refusal to grant the defendant's motion to quash the information in said cause.

(b) The judgment is against law and the evidence.

(c) The statute is not applicable to the facts.

(d) The judgment violates the right of the defendant to the free exercise of religious belief, under the Constitution of the United States, and the Treaty of Guadalupe Hidalgo.

(e) The facts show no intent to violate the statute; and show only an offense against state statutes.

(f) There is no proof of immorality; no proof of debauchery, lasciviousness, indeceney or lewdness, or proof of any act against peace and good order, or against good morals.

Rec'd copy of June 7, 1944.

John S. Boyden, Asst. U. S. Atty.

[fol. 93] IN UNITED STATES DISTRICT COURT

No. 14480, Criminal

UNITED STATES OF AMERICA

vs.

VERGEL Y. JESSOP

FORM OF CLERK'S STATEMENT OF DOCKET ENTRIES TO BE FORWARDED UNDER RULE IV

1. Indictment violation of Section 398, Title 18, U.S.C.A. —Mann Act filed March 6, 1944.

2. Arraignment March 9, 1944.

3. Plea to indictment of "Not Guilty" entered on March 20, 1944.

4. Motion to withdraw plea of guilty denied —, 19—.

5. Trial by court if jury waived March 21, 1944.

6. Verdict or finding of guilt signed by the Court and filed June 7, 1944.

7. Judgment—(with terms of sentence). Defendant committed to the custody of the Attorney General for imprisonment for a period of three (3) years entered June 7, 1944.

8. Notice of appeal filed June 8, 1944.

Date June 8, 1944.

Attest W. B. Wilson, Clerk.

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[The assignments of error are identical with the assignments of error in case No. 14475, which appear at page 32.]

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[The request for transcript of record is identical with the request for transcript of record in case No. 14475, which appears at page 34.]

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[The stipulation and order re bill of exceptions are identical with the stipulation and order re bill of exceptions in case No. 14475, which appear at page 35.]

[fol. 94] [The stipulation re transcript of proceedings on June 7, 1944, is identical with the stipulation re transcript of proceedings in case No. 14475, which appear at page 36.]

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[The reporter's transcript of proceedings June 7, 1944, is identical with the transcript of proceedings in case No. 14475, which appears at page 36.]

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Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 95] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

No. 14481 Criminal

UNITED STATES OF AMERICA, Plaintiff,

v.

WILLIAM CHATWIN, CHARLES F. ZITTING and EDNA CHRISTENSEN, Defendants

INDICTMENT—Filed March 6, 1944

The grand jurors for the United States of America impaneled and sworn in the District Court of the United States for the Central Division of the District of Utah at the November term of said court in the year 1943, and inquiring for said District of Utah, upon their oath present:

That heretofore, to-wit, on or about August 15, 1941, at Provo in the Central Division of the District of Utah, a person, to-wit, Dorothy Wyler, a minor child, age 15, was unlawfully inveigled, decoyed and carried away by William Chatwin, alias Ed Samson, Charles F. Zitting and Edna Christensen, hereinafter called defendants, and the said defendants then held and continued until December 9, 1943, to hold said Dorothy Wyler by such unlawful inveigling and decoying, and that on or about November 1, 1941, said defendants, then well knowing said Dorothy Wyler to have

been inveigled, decoyed, carried away and held, as aforesaid, unlawfully and feloniously did transport, cause to be transported and aid and abet in the transporting of said Dorothy Wyler by means of automobile transportation from Provo in the Central Division of the District of Utah by way of El Paso, Texas, to Short Creek in the District [fol. 96] of Arizona; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

A True Bill:

Don Clyde, Foreman of the Grand Jury.

Dan B. Shields, United States Attorney.

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IN UNITED STATES DISTRICT COURT

MINUTE ENTRY—March 20, 1944

On this 20th day of March, 1944, plaintiff appearing by John S. Boyden, Assistant United States Attorney, and defendant in person, and by Claude T. Barnes, Knox Patterson and J. H. McKnight, his attorneys. Defendants Chatwin, Zitting and Christensen were arraigned, gave their true names as William Chatwin, Charles F. Zitting and Edna Christensen, waived reading to them of the indictment, and each entered a plea of not guilty. Case set for trial on March 20, 1944.

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IN UNITED STATES DISTRICT COURT

MINUTE ENTRY—March 21, 1944

On this 21st day of March, 1944, come again said parties by their respective attorneys as aforesaid, and Defendants Chatwin, Chistensen, and Zitting in person, and said defendants consented that the case might be tried on stipulation of facts and jury expressly waived. Ordered that further hearing be continued until March 22, 1944.

IN UNITED STATES DISTRICT COURT

PORTION OF REPORTER'S TRANSCRIPT—March 21, 1944

Mr. Boyden: William Chatwin, Charles F. Zitting and Edna Christensen.

Mr. Chatwin, you are one of the defendants in case No. 14481?

Mr. Chatwin: Yes, sir.

[fol. 97] Mr. Boyden: Edna Christensen, you are also a defendant in the same case?

Mrs. Christensen: Yes, sir.

Mr. Boyden: Mr. Zitting, you are also a defendant in the same case?

Mr. Zitting: Yes, sir.

Mr. Boyden: Now, do you and each of you hereby expressly waive a jury trial and consent that your case might be tried before the court sitting without a jury on the stipulation as entered by your counsel?

Mr. Chatwin: Yes, sir.

Mrs. Christensen: Yes, sir.

Mr. Zitting: Yes, sir.

Certificate

I certify that the within pages numbered 1 to 3, inclusive, contain a true and correct transcript of my shorthand notes of the within proceedings had in said case on March 21, 1944.

E. M. Garnett, Official Reporter.

Filed June 16, 1944.

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IN UNITED STATES DISTRICT COURT

STIPULATION OF FACTS—Filed March 21, 1944

Come now parties in the above entitled action, United States of America by Dan B. Shields, United States Attorney, and John S. Boyden, Assistant United States Attorney, the defendants William Chatwin, Charles F. Zitting and Edna Christensen, by J. H. McKnight, Claude T. Barnes, and Knox Patterson, Attorneys-at-Law, and stipulate that the above entitled cases may be tried before the Court sitting without a jury upon the following statement

of testimony, which would, were it not for this stipulation, be introduced by the government:

That after the death of the legal wife of the defendant William Chatwin, in the year 1939, one Lulu Cook, of the age of over sixty years, came to his home in Santaquin, Utah, where she continued to reside with him.

[fol. 98] That in August, 1940, the defendant William Chatwin, then sixty-eight years of age, approached the parents of one Dorothy Wyler with respect to having said Dorothy Wyler work as a housekeeper for him. Said Dorothy Wyler was then a girl of fourteen years and eight months of age, backward in school and with an I.Q. of 67, and a mental age of 7 years and 2 months. The parents of Dorothy Wyler consented that she might act as such housekeeper, whereupon she entered into such duties. While residing at the home of William Chatwin she was continually taught by William Chatwin and Lulu Cook that celestial or plural marriage was essential to her salvation. The defendant Chatwin told said Dorothy Wyler that it was her grandmother's desire that he should take her in celestial marriage and that such plural marriage was in conformity with the true *principals* and teachings of the Mormon Church as orginally founded. She was further taught that the Mormon church as now constituted is not following the law of God but purely following the law of man. After the constant teachings along this line by the defendant Chatwin, Dorothy Wyler became converted to the *principal* of celestial or plural marriage and went through a religious ceremony of the Fundamentalists Cult without any compliance with the laws of the land on the 19th day of December, 1940. Thereafter, Dorothy Wyler became pregnant, which fact was discovered by the parents of Dorothy Wyler on July 24, 1941. Whereupon her parents informed the juvenile authorities of the circumstances.

On or about the 4th day of August, 1941, Dorothy Wyler was taken into the custody of the juvenile authorities of the State of Utah as a delinquent and was by said Court made a ward thereof on or about said day, and was by said Court on the 8th day of August, 1941 ordered placed in the custody of the Utah County Welfare Department for placement in a foster home, subject to the continuing jurisdiction of the juvenile court.

That on or about the 10th day of August, 1941, Mrs. Theora Marcil, in her official capacity as Juvenile Probation Officer for Utah County, State of Utah, took said Dorothy Wyler, who was then in her custody, to a motion picture show at Provo, Utah. Said Mrs. Marcil left said Dorothy [fol. 99] Wyler at said picture show with two of her own daughters and later returned to call for them. Upon her return Dorothy Wyler requested that she be allowed to stay a short time longer, which consent was given by Mrs. Marcil.

Thereafter, and prior to the second return of Mrs. Marcil, Dorothy Wyler left the picture show and went out onto the street in Provo, where she met Mrs. Lorelda Smith and Mrs. Alberta Wyler, both daughters of defendants Chatwin, who gave her sufficient money to go to Salt Lake City, Utah. When she arrived at Salt Lake City she went to the home of David Darger, a member of said religious cult, where she remained for about two hours before being taken to the home of defendants Charles F. Zitting and Edna Christiansen in Sandy, Utah. While at the home of defendants Zitting and Christensen, also members of the Fundamentalists Cult, all three defendants herein talked with said Dorothy Wyler convincing her that she should abide, as they put it, "by the law of God rather than the law of man" and that she was perfectly justified in running away from the Juvenile Court in order that she might live with defendant Chatwin.

Defendants further convinced said Dorothy Wyler that she should go with them to Mexico to be married legally to defendant Chatwin and then remain in hiding until she reached her majority according to the laws of the State of Utah. Thereafter, on about the 6th day of October, 1941, all defendants, in the Nash Sedan of defendant Zitting, then registered in the name of Elvira C. Olson, one of the plural wives of defendant Zitting, transported said Dorothy Wyler from Salt Lake City, Utah by way of El Paso, Texas, to Juarez, Mexico, where defendant William Chatwin and said Dorothy Wyler went through a civil marriage ceremony on the 14th day of October, 1941. That at said time said Dorothy Wyler gave her age as 18 years. After said marriage ceremony, said defendants William Chatwin, Charles F. Zitting and Edna Christensen transported said Dorothy Wyler in the automobile heretofore described from

Juarez, Mexico to Cedar City, Utah, at which point defendant William Chatwin obtained transportation from another member of the cult, Fred Jessop, to take said Dorothy Wyler to Short Creek, Arizona, where she remained in hiding [fol. 100] until December 9, 1943, when discovered by Federal authorities.

That while said Dorothy Wyler was in hiding in Short Creek, Arizona, she lived with William Chatwin as Mr. and Mrs. Ed. Samson. At Short Creek, Arizona two normal babies were born to her by William Chatwin, the first on the 20th day of November, 1941, the second on the 28th day of June, 1943. That said children were delivered at the residence of said defendant William Chatwin by a member of the cult, to-wit, Lizzie Colvin, a midwife.

That about 18 days after the arrival of defendant Chatwin and Dorothy Wyler in Short Creek, Arizona, Lulu Cook arrived in Short Creek, Arizona and resided on the same premises in a one-room lumber structure approximately two feet from the living quarters of defendant Chatwin and Dorothy Wyler.

That said Dorothy Wyler is now a high grade moron with an I.Q. of 64 and a mental age of 9 years and 8 months. That in June 1940 said Dorothy Wyler was graduated from the ninth grade in school for social reasons.

That the transportation of Dorothy Wyler from Provo to Salt Lake, thence to Juarez, Mexico and finally to Short Creek, Arizona, was without the consent and against the wishes of the parents of said Dorothy Wyler and without authority from the Juvenile Court of Utah County, State of Utah.

That while said Dorothy Wyler was in hiding at Short Creek, Arizona she corresponded and thereby kept in touch with defendants Edna Christensen and Charles F. Zitting.

That at no time between the 15th day of August, 1941 and the 9th day of December, 1943, did the defendants herein, or any one of them, ever inform either the parents of Dorothy Wyler or the Juvenile Court of Utah County as to the whereabouts of said Dorothy Wyler, notwithstanding the fact that said defendants at all times during said period were advised as to where said Dorothy Wyler was secreted.

That Edna Christensen became the plural wife of Charles [fol. 101] F. Zitting in August, 1928, and has been such ever since, and there are eight children issue of such union.

Dan B. Shields, United States Attorney; John S. Boyden, Assistant United States Attorney. Claude T. Barnes, J. H. McKnight, Knox Patterson, Attorneys for Defendants.

Dated this 21st day of March, 1944.

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IN UNITED STATES DISTRICT COURT

MOTION TO QUASH TRUE BILL

Come now the defendants, William Chatwin, alias Ed Samson, Charles F. Zitting and Edna Christensen, by their counsel and respectfully move the court to quash each and every count of the alleged true bill in the above entitled matter, for the reasons and upon the grounds:

I

That said true bill does not state an offense against the laws of the United States, and in particular does not state an offense under Sec. 408a, T. 18, U. S. C. A.

[The further grounds set out in the motion to quash and the challenge to the grand jury panel are identical with the grounds and the challenge in case No. 14478, pages 69 and 70.]

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[The motion for verdict for defendants is substantially identical with the motion for verdict for defendant in case No. 14475, which appears at page 14.]

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[The minute entry March 22, 1944, is identical with the minute entry in case No. 14478, which appears at page 76.]

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[fol. 102] [The memorandum opinion is identical with the opinion in case No. 14475, which appears at page 15.]

[The minute entry of May 22, 1944, is identical with the minute entry in case No. 14475, which appears at page 27.]

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IN UNITED STATES DISTRICT COURT

VERDICT BY THE COURT—Filed June 7, 1944

The above named defendants in open court haing waived a trial by jury and having consented that said cause may be tried before this Court without a jury upon a written stipulation of facts which has heretofore been submitted to this Court, and briefs having been filed by counsel for the United States of America, and by counsel for the defendants herein, and the matter having been taken under advisement, and the Court having considered the evidence introduced by such stipulations and having also considered the briefs of counsel filed as aforesaid, and the matter having been given due consideration now,

Therefore, I, T. Blake Kennedy, District Judge sitting within and for the District of Utah, do hereby find tne Defendants William Chatwin, Charles F. Zitting and Edna Christensen guilty as charged in the Indictment herein.

Dated: June 7, 1944.

T. Blake Kennedy, United States District Judge
Sitting within and for the District of Utah.

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IN UNITED STATES DISTRICT COURT

MINUTE ENTRY—June 7, 1944

On this 7th day of June, 1944, plaintiff appearing by John S. Boyden, Assistant United States Attorney, and defendants, William Chatwin, Charles F. Zitting and Edna Christensen, appearing in person and by Claude T. Barnes, J. H. McKnight and Knox Patterson, their attorneys. The Court declared each of said defendants guilty, and the [fol. 103] following verdict was signed and filed in open court:

[The verdict appears at page 102.]

The said defendants were asked if they had any reason to show why sentence should not be pronounced, and no

reason being shown, the Court ordered Defendants Chatwin and Zitting committed to the custody of the Attorney General for imprisonment for the period of two years, and Defendant Christensen committed to the custody of the Attorney General for imprisonment for the period of one year and one day, in an institution to be designated by the Attorney General. Judgments and Commitments signed by the Court and entered herein. The Court fixed the appeal bond for each defendant in the sum of $3000.00 and ordered the bond approved by the Clerk. Defendants ordered committed to the custody of the United States Marshal until said bonds were approved.

It was further ordered that a certain portion of the court reporter's transcript, wherein said defendant stated in open court that jury proceedings would be waived, together with all proceedings taken this day, be transcribed by the court reporter and same to be included in the record of appeal.

IN UNITED STATES DISTRICT COURT

JUDGMENT AND COMMITMENT

On this 7th day of June, 1944, came the United States Attorney, and the defendant Charles F. Zitting appearing in proper person, and with counsel and,

The defendant having been convicted on verdict of the Court of the offense charged in the Indictment in the above-entitled cause, to-wit: U. S. C. Title 18, Sec. 408a—Persons unlawfully detained and transported and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been [fol. 104] found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Two (2) Years.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

T. Blake Kennedy, United States District Judge.

IN UNITED STATES DISTRICT COURT

JUDGMENT AND COMMITMENT

On this 7th day of June, 1944, came the United States Attorney, and the defendant Edna Christensen appearing in proper person, and with counsel and,

The defendant having been convicted on verdict of the Court of the offense charged in the Indictment in the above-entitled cause, to-wit: U. S. C. Title 18, Sec. 408a—Persons unlawfully detained and transported and the defendant having been now asked whether she has anything to say why judgment should not be pronounced against her, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of One year (1) and One day (1).

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

T. Blake Kennedy, United States District Judge.

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[fol. 105] IN UNITED STATES DISTRICT COURT

JUDGMENT AND COMMITMENT

On this 7th day of June, 1944, came the United States Attorney, and the defendant William Chatwin appearing in propert person, and with counsel and,

The defendant having been convicted on verdict of the Court of the offense charged in the Indictment in the above-entitled cause, to-wit: U. S. C. Title 18, Sec. 408a—Persons unlawfully detained and transported and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized repre-

sentative for imprisonment for the period of Two (2) Years. It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

T. Blake Kennedy, United States District Judge.

SUMMARY OF BONDS ON APPEAL

Bond for Defendant Christensen in the sum of $3000.00, Leah Woolley and Rula K. Broadbent as sureties, approved by the clerk and filed June 7, 1944.

Bond for Defendant Chatwin in the sum of $3000.00, Spencer Warner and Mrs. M. C. Cook as sureties, approved by the clerk and filed June 7, 1944.

Bond for Defendant Zitting in the sum of $3000.00, Elvira B. Olson and Alfred Olschowski as sureties, approved by the clerk and filed June 7, 1944.

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[fol. 106] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed June 8, 1944

William E. Chatwin, RFD Santaquin, Utah County, Utah; Charles F. Zitting, Sandy, Utah; Edna Christensen, Sandy, Utah, Appellants.

Joseph H. McKnight, Atlas Bldg., Salt Lake City, Utah, Claude T. Barnes, 614 First Nat'l Bank Bldg., Salt Lake City, Utah, Knox Patterson, Boston Building, Salt Lake City, Utah, Attorneys for Appellants.

Offense: Vio. Sec. 408a, T. 18, U. S. C. A.: Lindbergh Act.

Brief description of judgment or sentence: The two men two years each; Edna Christensen 1 year and 1 day.

Name of prison where now confined, if not on bail: Defendants now on bail.

We, the above named appellants, hereby appeal to the United States Circuit Court of Appeals for the Tenth Circuit from the judgment above mentioned on the grounds set forth below.

Edna Christensen, Charles F. Zitting, William E. Chatwin, Appellants.

Dated June 7, 1944.

Grounds of Appeal:

(a) Court erred in overruling defendants' motion to quash.

(b) Judgment is against law and the evidence.

(c) The statute is not applicable to facts.

(d) Facts show no intent to violate law.

(e) There is no law or decision of courts in Utah adjudging the practice of plural marriage to be immoral, a debauchery, indecent or against public morals or in violation of peace, good order or good morals.

[fol. 107] (f) The facts show no intent to violate the statute; and show only an offense against state statutes.

Rec'd copy June 7, 1944.

John S. Boyden, Asst. U. S. Atty.

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In United States District Court

Form of Clerk's Statement of Docket Entries to Be Forwarded under Rule IV

No. 14481, Criminal

United States of America

vs.

William Chatwin, et al.

1. Indictment for violation Section 408a, T. 18, U. S. C. A. —person unlawfully detained and transported filed March 6, 1944.

2. Arraignment March 20, 1944.

3. Plea to indictment of "Not Guilty" entered on March 20, 1944.

4. Motion to withdraw plea of guilty denied —, 19—.

5. Trial by court if jury waived March 21, 1944.

6. Verdict or finding of guilt signed by the Court and filed June 7, 1944.

7. Judgment—(with terms of sentence) Defendant committed to the custody of the Attorney General for imprisonment for a period of two (2) years entered June 7, 1944.

8. Notice of appeal filed June 8, 1944.

Date June 8, 1944.

Attest W. B. Wilson, Clerk.

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IN UNITED STATES DISTRICT COURT

FORM OF CLERK'S STATEMENT OF DOCKET ENTRIES TO BE FORWARDED UNDER RULE IV

No. 14481, Criminal

UNITED STATES OF AMERICA

vs.

EDNA CHRISTENSEN, et al.

[fol. 108] 1. Indictment for violation of Section 408a, Title 18, U. S. C. A.—Persons unlawfully detained and transported filed March 6, 1944.

2. Arraignment March 7, 1944.

3. Plea to indictment of "Not Guilty" entered on March 20, 1944.

4. Motion to withdraw plea of guilty denied —, 19—.

5. Trial by court if jury waived March 21, 1944.

6. Verdict or finding of guilt signed by the Court and filed June 7, 1944.

7. Judgment—(with terms of sentence) Defendant Christensen committed to the custody of the Attorney General for imprisonment for a period of one (1) year and one (1) day entered June 7, 1944.

8. Notice of appeal filed June 8, 1944.

Date June 8, 1944.

Attest W. B. Wilson, Clerk.

IN UNITED STATES DISTRICT COURT

FORM OF CLERK'S STATEMENT OF DOCKET ENTRIES TO BE FORWARDED UNDER RULE IV

No. 14481, Criminal

UNITED STATES OF AMERICA

vs.

CHARLES F. ZITTING, et al.

1. Indictment for violation of Section 408a, Title 18, U. S. C. A.—Persons unlawfully detained and transported filed March 6, 1944.

2. Arraignment March 20, 1944.

3. Plea to indictment of "Not Guilty" entered on March 20, 1944.

4. Motion to withdraw plea of guilty denied —, 19—.

5. Trial by court if jury waived March 21, 1944.

6. Verdict or finding of guilt signed by the Court and filed June 7, 1944.

[fol. 109] 7. Judgment—(with terms of sentence) Defendant Zitting committed to the custody of the Attorney General for imprisonment for a period of Two (2) years entered June 7, 1944.

8. Notice of appeal filed June 8, 1944.

Date June 8, 1944.

Attest W. B. Wilson, Clerk.

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IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed June 21, 1944

I

The Court erred in its failure and refusal to grant the defendants' Motion to Quash the information in said cause.

II

The Court erred in its failure and refusal to find that the grand jury, finding the True Bill in said cause, was prejudiced and biased against these defendants.

III

The Court erred in finding the facts in the case, and the prosecution thereof, were applicable to Section 408a T. 18 U. S. C. A., known as the Lindbergh Act.

IV

The Court erred in denying these defendants' constitutional rights, under the Constitution of the State of Utah, under Article 1, sections 1, 4, 7, 11, 12 and 24; Article 3, and Article 6, sub-sections 5 and 18; and likewise erred in denying these defendants' constitutional rights under the 1st, 4th, 5th, 6th, 8th and 14th amendments to the Constitution of the United States.

V

The Court erred in disregarding the defendants' rights under the Treaty of Guadalupe Hidalgo, in the free exercise of their religion.

VI

The Court erred in finding the defendants had a criminal [fol. 110] intent in the commission of the acts charged in the information, and shown by the stipulated testimony in said cause.

VII

The Court erred in finding that these defendants violated the laws of the State of Utah, in connection with Federal statutes to give rise to federal prosecutions.

VIII

The Court erred in finding that the doctrine of ejusdem generis had no application under the so-called Lindbergh Act.

IX

The Court erred in finding these defendants guilty under the charge as laid, and under the stipulated testimony in

the case, and against the plea of not guilty entered by these defendants.

X

The Court erred in its failure and refusal to give these defendants the opportunity to file their motion for new trial as provided by the statutes and rules of this court in such case made and provided.

XI

The Court erred in sentencing these defendants under the finding of guilty, in that the Court lost jurisdiction by reason of its failure and refusal to grant these defendants the opportunity of filing a motion for new trial in said cause, and by reason of all of the assignments herein made.

XII

The Court erred in failing to find that the commission of the act charged under the stipulated testimony, was the result of an honest, Christian and Biblical belief.

XIII

(a) The Court erred in finding the defendants guilty because the defendants violated a state statute, and that such violation alone constituted prostitution and debauchery.

(b) And the Court erred in this by reason of entire lack of jurisdiction under or by reason of the provisions of a state statute.

[fol. 111]

XIV

The Court erred in passing upon the morals, or the contrary, involved in a marriage relation, such being a peculiar and exclusive prerogative of State Legislators and State Courts, and the entire lack of both legislative or judicial determination by the State of Utah.

Claude T. Barnes, J. H. McKnight, Knox Patterson,
Attorneys for Defendants.

Edw. D. Hatch, of Counsel.

Received copy of the above and foregoing Assignments of Error this 21st day of June, 1944.

Dan B. Shields, John S. Boyden, U. S. Attorney.

[The requests for transcript of record in these cases are identical with the request in case No. 14475, which appears at page 34.]

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[The stipulation and order re bill of exceptions are identical with the stipulation and order re bill of exceptions in case No. 14475, which appear at page 35.]

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[The stipulation re transcript of proceedings on June 7, 1944, is identical with the stipulation re transcript of proceedings in case No. 14475, which appear at page 36.]

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[The reporter's transcript of proceedings June 7, 1944, is identical with the transcript of proceedings in case No. 14475, which appears at page 36.]

* * * * * * *

[fol. 112] Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 113] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

No. 14483 Criminal

UNITED STATES OF AMERICA, Plaintiff,

v.

THERAL RAY DOCKSTADER and L R. STUBBS, Defendants

INDICTMENT—Filed March 6, 1944

The grand jurors for the United States of America impaneled and sworn in the District Court of the United States for the Central Division of the District of Utah at the November term of said court in the year 1943, and inquiring for said District of Utah, upon their oath present:

That heretofore, to-wit, on or about the 15th day of July, 1943, at 6708 South State Street, Salt Lake County in the Central Division of the District of Utah, Theral Ray Dock-

stader and L. R. Stubbs, hereinafter called defendants, unlawfully and feloniously, by means of automobile transportatoin, to-wit, 1938 International state truck, Motor No. 37116, did knowingly transport, cause to be transported and knowingly aid and assist in obtaining transportation for and in transporting a certain woman, to-wit, Anna Lindgreen, from 6708 South State Street, Salt Lake County, in the Central Division of the District of Utah, to Short Creek, Arizona, then and there for the purpose of debauchery and for a further immoral purpose, to-wit, that the aforesaid woman should unlawfully cohabit with said Theral Ray Dockstader, one of the defendants herein, as his mistress and concubine; contrary to the form of the statute in such case made and provided and against the peace and [fol. 114] dignity of the United States of America.

A True Bill:

Don Clyde, Foreman of the Grand Jury.

Dan B. Shields, United States Attorney.

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IN UNITED STATES DISTRICT COURT

MINUTE ENTRY—March 20, 1944

On this 20th day of March, 1944, plaintiff appearing by John S. Boyden, Assistant United States Attorney, and defendant in person, and by Claude T. Barnes, Knox Patterson, and J. H. McKnight, his attorneys. Defendant Dockstader was arraigned, gave his true name as charged, waived reading to him of the indictment and entered his plea of not guilty. Case ordered continued until March 21st for further proceedings.

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IN UNITED STATES DISTRICT COURT

MINUTE ENTRY—March 21, 1944

On this 21st day of March, 1944, come again said parties by their respective attorneys as aforesaid, and Defendant Dockstader in person, and it appearing that Defendant Stubbs would be present on March 22nd, further hearing as to both defendants ordered continued until said date.

IN UNITED STATES DISTRICT COURT

MINUTE ENTRY—March 22, 1944

On this 22nd day of March, 1944, plaintiff appearing by John S. Boyden, Assistant United States Attorney, and defendants in person and by J. H. McKnight, Claude T. Barnes and Knox Patterson, their attorneys. Defendant Stubbs was arraigned, gave his true name as charged, waived reading to him of the indictment and entered his plea of not guilty. Bail for Defendants Stubbs fixed in the sum of $2500.00. Defendants Dockstader and Stubbs consented that case might be tried on stipulation of facts and jury expressly waived.

[fol. 115] The Court heard the arguments of counsel on defendants' motion to quash and motion for verdict for defendants, and the motion to quash the indictment was overruled by the Court, and ruling on motion for verdict was held in abeyance until briefs are received by the Court. Defendants granted until April 12th to submit its brief, and plaintiff until May 3rd, and reply brief of defendant to be submitted May 8th. All briefs to be lodged with the Clerk and the Clerk to forward same to Judge T. Blake Kennedy at Cheyenne, Wyoming, at which time the case will be taken under advisement.

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IN UNITED STATES DISTRICT COURT

PORTION OF REPORTER'S TRANSCRIPT—March 22, 1944

(Defendants arraigned.)

Mr. Boyden: Mr. Dockstader and Mr. Stubbs, your counsel have prepared a stipulation as to the facts that might be proved by the Government, and the stipulation in terms has been reduced to writing which I now show you. You have gone over that with your counsel?

Mr. Dockstader: Yes, sir.

Mr. Boyden: And you?

Mr. Stubbs: Yes, sir.

Mr. Boyden: And you are both willing that your case might be submitted to the court sitting without a jury, on that statement of facts?

Mr. Dockstader: Yes, sir.

Mr. Stubbs: Yes, sir.

Mr. Boyden: And that you do now both expressly waive trial by jury?

Mr. Dockstader: Yes, sir.

Mr. Stubbs: Yes, sir.

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[fol. 116] CERTIFICATE

I certify that the within pages numbered from 1 to 3, inclusive, contain a true and correct transcript of my shorthand notes of the within proceedings in said case on March 22, 1944.

E. M. Garnett, Official Reporter.

Filed June 16, 1944.

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IN UNITED STATES DISTRICT COURT

STIPULATION OF FACTS—Filed March 22, 1944

Come now the parties in the above entitled action, United States of America by Dan B. Shields, United States Attorney, and John S. Boyden, Assistant United States Attorney, the defendants Theral Ray Dockstader and L. R. Stubbs, by J. H. McKnight, Claude T. Barnes, and Knox Patterson, Attorneys-at-Law, and stipulate that the above entitled cases may be tried before the Court sitting without a jury upon the following statement of testimony, which would, were it not for this stipulation, be introduced by the government:

That sometime prior to the month of April 1942, Theral Ray Dockstader, one of the defendants herein, entered into a religious ceremony known by the members of that religious cult called Fundamentalists, as celestial or plural marriage, with one Anna Lindgreen.

That during the first part of the month of July, 1943, said defendant, Theral Ray Dockstader, was maintaining two households, one at Short Creek, Arizona, where Leah Kilpack Dockstader resided, the other at 6708 South State Street, Salt Lake County, Utah, where Anna Lindgreen, a

plural wife of said defendant Theral Ray Dockstader, resided.

That his purported marriage with said Anna Lindgreen was contrary to the laws of the land.

[fol. 117] That on or about the 15th day of July, 1943, the defendant Theral Ray Dockstader, and Anna Lindgreen made arrangements with one L. R. Stubbs, also defendant herein, to transport said Anna Lindgreen and a portion of the furniture used in her household by means of a 1938 International Stake truck, Motor No. 37116, owned and registered in the name of L. R. Stubbs, to Short Creek, Arizona, where the said Anna Lindgreen was to live in plural marriage with defendant Theral Ray Dockstader and Leah Kilpack Dockstader.

That at the time of said transportation on, to-wit, the 15th day of July, 1943, L. R. Stubbs was also a member of the religious cut known as the Fundamentalists and was well acquainted with the defendant Theral Ray Dockstader and knew that said Theral Ray Dockstader was living in plural marriage with said Anna Lindgreen and Leah Kilpack Dockstader.

That said defendant, L. R. Stubbs also knew that Theral Ray Dockstader desired to move said Anna Lindgreen to Short Creek, Arizona to live with her in so called celestial marriage.

That on said 15th day of July, 1943, pursuant to the arrangement aforesaid, L. R. Stubbs, the defendant herein, transported Anna Lindgreen and a portion of said furniture, by means of International truck hereinbefore described, from her household at 6708 South State Street in Salt Lake County, Utah, to Short Creek, Arizona, and upon arriving at Short Creek, Arizona the furniture was unloaded from said truck, partially in a house then occupied by Leah Kilpack Dockstader and the remainder was unloaded in a canvas-covered water tank near said premises.

That after said transportation as aforesaid, the defendant Theral Ray Dockstader lived in plural marriage with said Anna Lindgreen at Short Creek, Arizona.

That both defendants, Theral Ray Dockstader and L. R. Stubbs professed a belief in plural marriage as a prerequisite to salvation under the original concepts of the Mormon

[fol. 118] church, claiming the abolition of polygamy in the Mormon church was an act of man and contrary to the law of God.

Dan B. Shields, United States Attorney. John S. Boyden, Assistant United States Attorney. Claude T. Barnes, J. H. McKnight, Knox Patterson.

Dated this 22nd day of March, 1944.

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IN UNITED STATES DISTRICT COURT

MOTION TO QUASH TRUE BILL

Come now the defendants, L. R. Stubbs and Theral R. Dockstader, by their counsel, and respectfully move the court to quash each and every count of the alleged True Bill in the above entitled matter, for the reasons and upon the ground:

[The grounds set out in the motion to quash and the challenge to the grand jury panel are identical with the grounds and the challenge in case No. 14478, pages 69 and 70.]

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[The motion for verdict for defendant is substantially identical with the motion for verdict for defendant in case No. 14475, which appears at page 14.]

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[The memorandum opinion is identical with the memorandum opinion in case No. 14475, which appears at page 15.]

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[The minute entry of May 22, 1944, is identical with the minute entry in case No. 14475, which appears at page 27.]

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[fol. 119] IN UNITED STATES DISTRICT COURT

VERDICT BY THE COURT—Filed June 7, 1944

The above named defendants in open court having waived a trial by jury and having consented that said cause may be tried before this Court without a jury upon a written

stipulation of facts which has heretofore been submitted to this Court, and briefs having been filed by counsel for the United States of America, and by counsel for the defendants herein, and the matter having been taken under advisement, and the Court having considered the evidence introduced by such stipulations and having also considered the briefs of counsel filed as aforesaid, and the matter having been given due consideration, now,

Therefore, I, T. Blake Kennedy, District Judge sitting within and for the District of Utah, do hereby find the Defendants Theral Ray Dockstader and L. R. Stubbs guilty as charged in the Indictment herein.

Dated: June 7, 1944.

T. Blake Kennedy, United States District Judge
Sitting within and for the District of Utah.

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IN UNITED STATES DISTRICT COURT

MINUTE ENTRY—June 7, 1944

On this 7th day of June, 1944, plaintiff appearing by John S. Boyden, Assistant United States Attorney, and Defendants Dockstader and Stubbs appearing in person and by Claude T. Barnes, J. H. McKnight, and Knox Patterson, their attorneys. The Court declared each Defendant guilty, and the following verdict was signed and filed in open court:

[The verdict appears at page 119.]

The said defendants were asked if they had any reason to show why sentence should not be pronounced, and no reason being shown, the Court ordered defendants, Dockstader and Stubbs committed to the custody of the Attorney [fol. 120] General for imprisonment for the period of three years in an institution to be designated by the Attorney General. Judgments and Commitments signed by the Court and entered herein. The Court fixed the appeal bond for each defendant in the sum of $3000.00, and bonds ordered approved by the Clerk. Defendants ordered committed to the custody of the United States Marshal until said bonds were approved.

It was further ordered that a certain portion of the court reporter's transcript, wherein said defendant stated in open

court that jury proceedings would be waived, together with all proceedings taken this day, be transcribed by the court reporter and same to be included in the record of appeal.

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IN UNITED STATES DISTRICT COURT

No. 14483

UNITED STATES

v.

THERAL RAY DOCKSTADER, et al.

JUDGMENT AND COMMITMENT

On this 7th day of June, 1944, came the United States Attorney, and the defendant Theral Ray Dockstader appearing in proper person, and with counsel and,

The defendant having been convicted on verdict of the Court of the offense charged in the Indictment in the above-entitled cause, to-wit: U. S. C. Title 18, Sec. 398—Mann Act and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of—Three (3) Years—

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States [fol. 121] Marshal or other qualified officer and that the same shall serve as the commitment herein.

T. Blake Kennedy, United States District Judge.

IN UNITED STATES DISTRICT COURT

No. 14483

UNITED STATES

v.

L. R. STUBBS, et al.

JUDGMENT AND COMMITMENT

On this 7th day of June, 1944, came the United States Attorney, and the defendant L. R. Stubbs appearing in proper person, and with counsel and,

The defendant having been convicted on verdict of the Court of the offense charged in the Indictment in the above-entitled cause, to-wit: U.S.C. Title 18, Sec, 398—Mann Act and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court.

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Three (3) Years.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

T. Blake Kennedy, United States District Judge.

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SUMMARY OF BONDS ON APPEAL

Bond for Defendant Stubbs in the sum of $3,000.00, Rula K. Broadbent and Althea F. Beagley as sureties, approved by clerk and filed June 7, 1944.

[fol. 122] Bond for Defendant Dockstader in the sum of $3,000.00, Barbara Owen Kelsch, Leah Woolley, and Margery DeHart Timpson as sureties, approved by clerk and filed June 7, 1944.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed June 8, 1944

Theral Ray Dockstader and L. R. Stubbs, Short Creek, Arizona, Appellants.

Joseph H. McKnight, Atlas Block, Salt Lake City, Utah, Claude T. Barnes, 614 First Nat'l Bank Bldg., Salt Lake City, Utah, Knox Patterson, Boston Building, Salt Lake City, Utah, Attorneys for Appellants.

Offense: Vio. Seec. 398, T. 18, U.S.C.: Mann Act.

Brief description of judgment or sentence: Three years each.

Name of prison where now confined, if not on bail: Defendants are now on bail.

We, the above named Appellants, hereby appeal to the United States Circuit Court of Appeals for the Tenth Circuit from the judgment above mentioned on the grounds set forth below.

Theral Ray Dockstader, Appellant. L. R. Stubbs, Appellant.

Dated June 7th, 1944.

Grounds of Appeal:

(a) The Court erred in its failure and refusal to grant the defendant's motion to quash the information in said cause.

(b) The judgment is against law and the evidence.

(c) The statute is not applicable to the facts.

(d) The judgment violates the right of the defendant to the free exercise of religious belief, under the Constitution of the United States, and the Treaty of Guadalupe Hidalgo.

[fol. 123] (e) The facts show no intent to violate the statute; and show only an offense against state statutes.

(f) There is no proof of immorality; no proof of debauchery, lasciviousness, indecency or lewdness, or proof of any act against peace and good order, or against good morals.

Rec'd copy June 7, 1944.

John S. Boyden, Asst. U. S. Atty.

IN UNITED STATES DISTRICT COURT

FORM OF CLERK'S STATEMENT OF DOCKET ENTRIES TO BE FORWARDED UNDER RULE IV

No. 14483, Criminal

UNITED STATES OF AMERICA

vs.

THERAL RAY DOCKSTADER, et al.

1. Indictment violation Sec. 398, Title 18, U.S.C.A.—Mann Act, filed March 6, 1944.

2. Arraignment March 9, 1944.

3. Plea to indictment of 'Not Guilty' entered on March 20, 1944.

4. Motion to withdraw plea of guilty denied —, 19—.

5. Trial by court if jury waived March 22, 1944.

6. Verdict or finding of guilt signed by Court and filed June 7, 1944.

7. Judgment—(with terms of sentence). Committed to the custody of the Attorney General for imprisonment for a period of three (3) years entered June 7, 1944.

8. Notice of appeal filed June 8, 1944.

Date June 8, 1944.

Attest W. B. Wilson, Clerk.

[fol. 124] IN UNITED STATES DISTRICT COURT

FORM OF CLERK'S STATEMENT OF DOCKET ENTRIES TO BE FORWARDED UNDER RULE IV

No. 14483, Criminal

UNITED STATES OF AMERICA

vs.

L. R. STUBBS, et al.

1. Indictment for violation of Section 398, Title 18, U. S. C. A.—Mann Act filed March 6, 1944.

2. Arraignment March 22, 1944.

3. Plea to indictment Not guilty March 22, 1944.

4. Motion to withdraw plea of guilty denied none.

5. Trial by court if jury waived March 22, 1944.

6. Verdict or finding of guilt signed by court and filed June 7, 1944.

7. Judgment—(with terms of sentence). Committed to the custody of the Attorney General for imprisonment for a period of three (3) years entered June 7, 1944.

8. Notice of appeal filed June 8, 1944.

Date June 8, 1944.

Attest. W. B. Wilson, Clerk.

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[The assignments of error are identical in substance with the assignments of error in case No. 14475, which appear at page 32.]

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[The requests for transcript of record in these cases are identical with the request in case No. 14475, which appears at page 34.]

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[The stipulation and order re bill of exceptions are identical with the stipulation and order re bill of exceptions in case No. 14475, which appear at page 35.]

[fols. 125-126] [The stipulation re transcript of proceedings on June 7, 1944, is identical with the stipulation re transcript of proceedings in case No. 14475, which appear at page 36]

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[The reporter's transcript of proceedings June 7, 1944, is identical with the transcript of proceedings in case No. 14475, which appears at page 36.]

Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 127] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

* * * * * * *

No. 14489 Criminal

UNITED STATES OF AMERICA, Plaintiff

v.

FOLLIS GARDNER PETTY, Defendant

INDICTMENT—Filed March 6, 1944

The grand jurors for the United States of America impaneled and sworn in the District Court of the United States for the Central Division of the District of Utah at the November term of said court in the year 1943, and inquiring for said District of Utah, upon their oath present:

That heretofore, to-wit, on or about the 11th day of August, 1943, at Providence, in the Northern Division of the District of Utah, one Follis Gardner Petty hereinafter called defendant, unlawfully and feloniously, by means of automobile transportation, to-wit, 1941 Studebaker Sedan, Motor No. 144524, did knowingly transport, cause to be transported and knowingly aid and assist in obtaining transportation for and in transporting a certain woman, to-wit, Mary Marguerite Ford, from Pocatello, Idaho, to Providence in the Northern Division of the District of Utah, then and there for the immoral purpose that the aforesaid woman should be and live with him as his mistress and concubine; contrary to the form of the statute in such case

[fol. 128] made and provided and against the peace and dignity of the United States of America.

A True Bill:

Don Clyde, Foreman of the Grand Jury.

Dan B. Shields, United States Attorney.

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IN UNITED STATES DISTRICT COURT

MINUTE ENTRY—March 20, 1944

On this 20th day of March, 1944, plaintiff appearing by John S. Boyden, Assistant United States Attorney, and defendant in person, and by Claude T. Barnes, Knox Patterson and J. H. McKnight, his attorneys. Defendant Petty was arraigned, gave his true name as charged, waived reading to him of the indictment and entered his plea of not guilty. Case ordered continued until March 21st for further proceedings.

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IN UNITED STATES DISTRICT COURT

MINUTE ENTRY—March 21, 1944

On this 21st day of March, 1944, come again said parties by their respective attorneys as aforesaid, and Defendant Petty in person, and said defendant consented that case might be tried on stipulation of facts and jury expressly waived. Ordered that further hearing be continued until March 22, 1944.

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IN UNITED STATES DISTRICT COURT

PORTION OF REPORTER'S TRANSCRIPT—March 21, 1944

Mr. Boyden: Follis Gardner Petty

Mr. Petty, you are the defendant in case No. 14489?

Mr. Petty: Yes, sir.

Mr. Boyden: And you are acquainted with the stipulation that has been agreed upon by your counsel?

Mr. Petty: Yes, sir.

Mr. Boyden: And do you consent that the case might be tried upon that stipulation?

[fol. 129] Mr. Petty: Yes, sir.

Mr. Boyden: And that it might be tried before the court without a jury, and you hereby expressly waive a jury trial?

Mr. Petty: Yes, sir.

Certificate

I certify that the within pages numbered from 1 to 3, inclusive, contain a true and correct transcript of my shorthand notes of the within proceedings had in said case on March 21, 1944.

E. M. Garnett, Official Reporter.

Filed June 16, 1944.

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In United States District Court

Stipulation of Facts—Filed March 21, 1944

Come now parties in the above entitled action, United States of America by Dan B. Shields, United States Attorney, and John S. Boyden, Assistant United States Attorney, the defendant Follis Gardner Petty by J. H. McKnight, Claude T. Barnes, and Knox Patterson, Attorneys-at-Law, and stipulate that the above entitled cases may be tried before the Court sitting without a jury upon the following statement of testimony, which would, were it not for this stipulation, be introduced by the government:

That the defendant, Follis Gardner Petty, was married to Iva Campbell at Columbia, Kentucky, on the 31st of December, 1913, and since that time has continued to be her lawfully wedded husband.

That defendant became acquainted with Mary Marguerite Ford, a crippled woman 31 years of age, at Pocatello, Idaho, during hte year 1932, while she was working for Laura B. Berg, County Treasurer of Bannock County, Idaho, and doing work for the L. D. S. Genealogical Society of Idaho in Pocatello.

That during the year 1934 the defendant and his wife both became well acquainted with Mary Marguerite Ford and often talked to her respecting plural or celestial marriages.

[fol. 130] That during that year the defendant paid considerable attention to Miss Ford, and his wife during the

month of May, 1934, proposed plural marriage to Miss Ford on behalf of her husband.

That after a period of argument and discussion Miss Ford became converted to the doctrine of plural marriage and consented to marry the defendant according to the plan and ritual of the religious cult known as Fundamentalists, which the said defendant claimed to be based upon the original concepts of the Mormon Church.

That Joseph Leslie Broadbent, then a member of the Priesthood Council of the Fundamentalists, and now deceased, performed said religious ceremony at Salt Lake City, Utah, on July 7, 1934.

The defendant then promised Miss Ford that he would set up a separate home for her in the very near future, but immediately following her marriage she continued to live with her mother at Pocatello, Idaho, but engaged in sexual relations with the defendant regularly at the defendant's apartment, in the absence of his legal wife, and in a small building at the rear of the Petty apartment used primarily for the storing of furniture.

This relationship continued until Miss Ford became pregnant, and that thereafter the defendant provided various living quarters for her in Salt Lake City, where she bore the defendant three children, one of which died during birth; that these children were all delivered in private homes of members of the cult by members of the cult, to-wit, Louisa C. E. Ogden, a midwife, Dr. Rulon C. Allred, a naturopathic physician and obstetrician, and Dr. LeGrand Woolley, M. D.

That the information furnished with the birth certificates used various names as parents of the children, but on each occasion using the name of Petty as the surname.

That on January 14, 1943, the defendant moved his said plural wife, Mary Marguerite Ford to Providence, Utah, where he continued to live with her as man and wife, commuting between his home in Pocatello and his home in Providence, living with the two wives alternately.

[fol. 131] In July of 1943 defendant consented to a visit by said Mary Ford with her cousin at Driggs, Idaho, and provided her with transportation.

After her visit she returned to Pocatello, where she immediately got in touch with defendant through her mother.

The defendant in his automobile, a 1941 Studebaker sedan, Motor No. 144524, transported Mary Marguerite Ford from

Pocatello, on or about the 11th day of August, 1943, to Providence, Utah, where he had theretofore established living quarters for her.

At this time domestic difficulties were arising between the defendant and Miss Ford. When Petty arrived at Providence, Utah, he proposed sexual relations, but Miss Ford refused, and he returned to Pocatello without actually having such relations.

In the early part of September the defendant came back to Providence, where he again proposed sexual relations, which were again refused. Disrobed, except for his underwear, he forcibly attempted to have relations, placing his knee upon her crippled leg. During the struggle that ensued, someone was heard on the front porch. The defendant immediately abandoned his attempt, and informed Miss Ford that if that was her attitude he had no obligation to further support the children.

Since that time to the commencement of this action the defendant furnished Miss Ford with only five dollars, and she has been forced to rely solely upon public relief for her sustenance.

Dan B. Shields, United States Attorney. John S. Boyden, Assistant United States Attorney. Claude T. Barnes, J. H. McKnight, Knox Patterson, Attorneys for defendant.

Dated this 21st day of March, 1944.

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[fol. 132] IN UNITED STATES DISTRICT COURT

MOTION TO QUASH TRUE BILL

Comes now the defendant, Follis Gardner Petty, by his counsel and respectfully moves the court to quash each and every count of the alleged True Bill in the above entitled matter, for the reasons and upon the grounds:

[The grounds set out in the motion to quash and the challenge to the grand jury panel are identical with the grounds and the challenge in case No. 14478, pages 69 and 70.]

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[The motion for verdict for defendant is identical with the motion for verdict for defendant in case No. 14475, which appears at page 14.]

[The minute entry March 22, 1944, reargument on motion to quash indictment etc. is identical with the minute entry in case No. 14478, which appears at page 76.]

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[The memorandum opinion is identical with the memorandum opinion in case No. 14475, which appears at page 15.]

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[The minute entry, May 22, 1944, is identical with the minute entry in case No. 14475, which appears at page 27.]

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IN UNITED STATES DISTRICT COURT

VERDICT BY THE COURT—Filed June 7, 1944

The above named defendant in open court having waived a trial by jury and having consented that said cause may be tried before this Court without a jury upon a written stipulation of facts which has heretofore been submitted to this Court; and briefs having been filed by counsel for the United States of America, and by counsel for the defendant herein, and the matter having been taken under advisement, and the Court having considered the evidence introduced by such stipulations and having also considered the briefs [fol. 133] of counsel filed as aforesaid, and the matter having been given due consideration, now,

Therefore, I, T. Blake Kennedy, District Judge sitting within and for the District of Utah, do hereby find the Defendant Follis Gardner Petty, Guilty as charged in the Indictment herein.

Dated: June 7, 1944.

T. Blake Kennedy, United States District Judge
Sitting within and for the District of Utah.

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IN UNITED STATES DISTRICT COURT

MINUTE ENTRY—June 7, 1944

On this 7th day of June, 1944, plaintiff appearing by John S. Boyden, Assistant United States Attorney, and Defendant Petty appearing in person and by Claude T.

Barnes, J. H. McKnight and Knox Patterson, his attorneys. The Court declared Defendant Petty guilty, and the following verdict was signed and filed in open Court:

[The verdict appears at page 132.]

The said defendant was asked if he had any reason to show why sentence should not be pronounced, and no reason being shown, the Court ordered Defendant Petty committed to the custody of the Attorney General for imprisonment for the period of three years in an institution to be designated by the Attorney General. Judgment and Commitment signed by the Court and entered herein. The Court fixed the appeal bond in the sum of $3000.00, and ordered the bond approved by the Clerk. Defendant ordered committed to the custody of the United States Marshal until said bond was approved.

It was further ordered that a certain portion of the court reporter's transcript, wherein said defendant stated in open court that jury proceedings would be waived, together with all proceedings taken this day, be transcribed by the court reporter and same to be included in the record of appeal.

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[fol. 134] IN UNITED STATES DISTRICT COURT

JUDGMENT AND COMMITMENT

On this 7th day of June, 1944, came the United States Attorney, and the defendant Follis Gardner Petty appearing in proper person, and with counsel and,

The defendant having been convicted on verdict of the Court of the offense charged in the Indictment in the above-entitled cause, to-wit: U. S. C. Title 18, Sec. 398—Mann Act and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of—Three (3) Years—

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States

Marshal or other qualified officer and that the same shall serve as the commitment herein.

T. Blake Kennedy, United States District Judge.

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SUMMARY OF BOND ON APPEAL

Bond in sum of $3,000.00, Edna Christensen and Arnold Boss as sureties, approved by clerk and filed June 7, 1944.

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IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed June 8, 1944

Follis Gardner Petty, Pocatello, Idaho, Appellant.

Joseph H. McKnight, Atlas Block, Salt Lake City, Utah; Claude T. Barnes, 614 First Natl. Bank Bldg., Salt Lake City, Utah; Knox Patterson, Boston Building, Salt Lake City, Utah, Attorneys for Appellant.

[fol. 135] Offense: Vio. Sec. 398, T. 18, U. S. C.: Mann Act.

Brief description of judgment or sentence: Three years.

Name of prison where now confined if not on bail: Defendant is now on bail.

I, the above named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Tenth Circuit from the judgment above mentioned on the grounds set forth below.

Follis G. Petty, Appellant.

Dated June 7th, 1944.

Grounds of Appeal:

(a) The Court erred in its failure and refusal to grant the defendant's motion to quash the information in said cause.

(b) The judgment is against law and the evidence.

(c) The statute is not applicable to the facts.

(d) The judgment violates the right of the defendant to the free exercise of religious belief, under the Constitution of the United States, the Treaty of Guadalupe Hidalgo.

(e) The facts show no intent to violate the statute; and show only an offense against state statutes.

(f) There is no proof of immorality; no proof of debauchery, lasciviousness, indecency or lewdness, or proof of any act against peace and good order, or against good morals.

Rec'd copy June 7, 1944.

John S. Boyden, Asst. U. S. Atty.

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[fol. 136] IN UNITED STATES DISTRICT COURT

FORM OF CLERK'S STATEMENT OF DOCKET ENTRIES TO BE FORWARDED UNDER RULE IV

No. 14489, Criminal

UNITED STATES OF AMERICA

vs.

FOLLIS GARDNER PETTY

1. Indictment for violation Sec. 398, Title 18, U. S. C. A.—Mann Act filed March 6, 1944.

2. Arraignment March 20, 1944.

3. Plea to indictment Not guilty March 20, 1944.

4. Motion to withdraw plea of guilty denied none.

5. Trial by court if jury waived March 21, 1944.

6. Verdict or finding of guilt signed by court and filed June 7, 1944.

7. Judgment—(with terms of sentence) Committed to the custody of the Attorney General for imprisonment for a period of three (3) years entered June 7, 1944.

8. Notice of appeal filed June 8, 1944.

Date June 8, 1944.

Attest W. B. Wilson, Clerk.

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[The assignments of error are identical with the assignments of error in case No. 14475, which appear at page 32.]

[The request for transcript of record is identical with the request for transcript of record in case No. 14475, which appears at page 34.]

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[The stipulation and order re bill of exceptions are identical with the stipulation and order re bill of exceptions in case No. 14475, which appear at page 35.]

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[fols. 137-138] [The stipulation re transcript of proceedings on June 7, 1944, is identical with the stipulations re transcript of proceedings in case No. 14475, which appears at page 36.]

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[The reporter's transcript of proceedings June 7, 1944, is identical with the transcript of proceedings in case No. 14475, which appears at page 36.]

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Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 139] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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ORDER OF SUBMISSION

Second Day, November Term, Tuesday, November 14th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

These causes came on to be heard, and were argued by counsel, Claude T. Barnes, Esquire, and Edwin D. Hatch, Esquire, appearing for appellants, John S. Boyden, Esquire, appearing for appellee.

Thereupon these causes were submitted to the court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

Claude T. Barnes and Edwin D. Hatch (J. H. McKnight and Knox Patterson were with them on the brief) for Appellants.

John S. Boyden, Ass't. U. S. Attorney, (Dan B. Shields, U. S. Attorney, and Scott M. Matheson, Ass't. U. S. Attorney, were with him on the brief) for Appellee.

Before Phillips, Bratton and Huxman, Circuit Judges

OPINION—January 4, 1945

BRATTON, Circuit Judge:

Six indictments were returned in the United States Court for Utah, five drawn under section 2 of the Mann Act, 18 U. S. C. A. §398, and one drawn under section 3 of the Kidnapping Act, as amended, 18 U. S. C. A. §408a. The indictment in one case drawn under the Mann Act charged that on a certain date Heber Kimball Cleveland transported a certain woman, not then his wife, in interstate commerce from Salt Lake City, Utah, to Evanston, Wyoming, for the purpose of debauchery, and for the further immoral purpose of having sexual intercourse with her. The other indictments drawn under the Mann Act contained like charges, varying only in name of the accused, name of the woman trans- [fol. 140] ported, date, and points of origin and termination respectively of the transportation. The indictment drawn under the Kidnapping Act charged that the defendants transported, caused to be transported, and aided and abetted in transporting a certain girl in interstate commerce from Provo, Utah, by way of El Paso, Texas, to Short Creek, Arizona, well knowing her to have been inveigled, decoyed, carried away, and held. After trial by jury had been waived, the cases were submitted to the court on stipulated facts. The court found the defendant or defendants in each case guilty as charged in the indictment; and from the sentences imposed, separate appeals were perfected but the cases were briefed and argued together.

A detailed statement of the particular facts in each case would not serve any useful purpose. In most of the cases involving the charge of violating the Mann Act, the defendant was married; while married to his lawful wife, he and the woman named in the indictment went through a cere-

mony known in the religious cult of Fundamentalists as a plural or celestial marriage; after the ceremony they went into another state for the purpose of living and cohabiting together; and they did live and cohabit together there. In one case, the defendant, while married to his lawful wife, and the girl named in the indictment went from Utah to California for the purpose of being married by a celestial ceremony and then living together as man and wife. After the ceremony they spent the night together and engaged in sexual intercourse, but the following day she refused to go further with their marriage. And in one case, one of the defendants was living in a state of plural marriage with the woman named in the indictment; and at their request, the other defendant, also a member of the Fundamentalist cult, transported the woman in interstate commerce in order that the cohabitation in plural marriage might continue. In some instances, the celestial ceremony was performed by a member of the Priesthood Council of the cult. In others, the record fails to indicate the position or title of the person performing it. In the case involving the charge of violating the Kidnapping Act, a girl fourteen years old but having the mental capacity of a child about seven years of age was employed by one of the defendants as a house-[fol. 141] keeper. They went through a celestial ceremony, and she later became pregnant. Discovering her condition, her parents informed the juvenile authorities; and she was placed in the custody of the Welfare Department of the state, subject to the continuing jurisdiction of the court. With some aid, she escaped and went to the home of the other two defendants. There the three defendants persuaded and convinced her that she should abide "by the law of God rather than the law of man"; that she was justified in running away from the Juvenile Court; that she should go with them to Mexico to be legally married to the defendant in whose home she had been employed; and that she should then remain in hiding until she reached her majority. After thus persuading and convincing the girl, all three defendants transported her from Salt Lake City to Juarez, Mexico, where a civil marriage ceremony was performed. They then transported her to a point in Utah. There the defendant who had assumed to marry her in the manner outlined obtained transportation from another member of the cult, and she was taken to Short Creek, Arizona, where she remained in hiding for more than two years, until discov-

ered by federal authorities. While in hiding, she and the defendant last referred to continued to live together as man and wife.

It is contended that the court erred in denying the motion to quash the indictment in each case. The ground relied upon in each instance was that the grand jury which returned the indictment, and each member thereof, was prejudiced against the defendant and was therefore disqualified to sit as a grand juror in the matter; and that the return of the indictment by grand jurors of that kind constituted a wrongful invasion of the rights of the defendant. An affidavit of the defendant was attached to the motion, in which it was stated that he was an earnest and profound believer in the doctrines and principles of the Church of Jesus Christ of Latter-day Saints, commonly referred to as the Mormon Church; that he believed in, taught, and practiced the doctrine of plural marriages; that about the year 1920 a breach arose in the church with reference to the practice of polygamy, resulting in factional disagreement and intense bitterness; that due to such bitterness, the dominating high [fol. 142] priesthood of the church aided, assisted, and incited the convening of the grand jury and the return of the indictment; that the foreman of the grand jury was a prominent and dominating figure in the high priesthood quorums of the church; that, upon information and belief, a large majority of the grand jurors, if not all of them, were likewise influential members of the church; and that the indictment was returned in a spirit of animosity and enmity toward the defendant. There is no need to explore the question of law whether in a United States court an indictment regular on its face may be attacked by motion to quash on the ground that some or all members of the grand jury which returned it were prejudiced against the accused. Except the ex parte affidavit attached to the motion, which contained many allegations predicated upon information and belief, there was no showing that the foreman or any other member of the grand jury belonged to any particular religious sect, or that he bore any animosity, enmity, or prejudice against the defendant. Neither was there any showing that due to prejudice or other like attitude toward the defendant, the foreman or any other membe xerted or sought to exert influence with members of the b in bringing about the return of the indictment. Assuming, without so deciding,

that the indictments were subject to attack on the ground indicated, the motions and ex parte affidavits, alone and without more, were not enough to warrant the quashing of them.

The judgments in the cases charging the violation of the Mann Act are challenged for lack of jurisdiction of the court. The argument is that it is the function of the states to regulate marriage and divorce within their respective borders; and that a United States court has no jurisdiction in cases of this kind to forbid, regulate, or declare upon the form, type, or number of marriages permissible in the state, or to declare that a polygamous marriage is bad in itself, or that it is a form of prostitution or debauchery. It does lie within the exclusive jurisdiction of the states to regulate and control marriage and divorce within their respective borders. And plural marriages are forbidden by the law of the state where these celestial ceremonies occurred, and by the law of the states into which the women and girls named [fol. 143] in the indictments were transported. But the Mann Act, supra, does not undertake to declare what marriages shall be legal and what illegal. It does not concern itself with that question. Instead, it is addressed to the matter of interstate commerce. Section 2 provides that it shall be unlawful to transport or aid in the transportation in commerce of any woman or girl for the purpose of prostitution, debauchery, or any other immoral purpose. Article 1, section 8, of the Constitution of the United States empowers Congress to regulate commerce among the states. That grant of power is direct, plenary, and without limitation except as limited by the Constitution itself. And within the permissible range of exertion of the power lies authority to enact all appropriate legislation for the protection and advancement of commerce. National Labor Relations Board v. Jones & Laughlin, 301 U. S. 1. Congress is free in the exercise of its discretion in respect to means of protecting and advancing commerce to adopt any means which appear to it as appropriate and adapted to the end in view, provided it is consistent with the letter and spirit of the Constitution. Everard's Breweries v. Day, 265 U. S. 545. And it is no basis for valid objection that the means adopted have the same quality and are attended by the same incidents which attend the police power of the states. United States v. Carolene Products Co., 304 U. S. 144.

Commerce among the states consists of intercourse and traffic among its citizens. It includes the transportation of persons as well as property. While the states alone can penalize the practice of prostitution, debauchery, or other immoral conduct within their respective borders, Congress has power under the constitutional provision, supra, to forbid such practices and conduct through the channels of interstate commerce. And it is within the constitutional range of the power of Congress to prohibit under penalty prostitutes, or persons who engage in debauchery or other immoral practices, being transported in commerce in furtherance of their immoral conduct. Hoke v. United States, 227 U. S. 308; Athanasaw v. United States, 227 U. S. 326; Wilson v. United States, 232 U. S. 563.

The Mann Act, supra, is not limited to the transportation [fol. 144] in interstate commerce of women and girls for the purpose of prostitution or debauchery. By express provision, it includes their transportation for any other immoral purpose. The primary objective in the enactment of the statute was to eliminate the "white slave" business which employs interstate commerce as a means of procuring and distributing its victims. But it is settled law that the transportation in commerce of a woman or girl for the purpose of her becoming the mistress or concubine of the accused comes within the Act. Caminetti v. United States, 242 U. S. 470. And we think that the transportation in commerce of a woman or girl to whom the accused is not legally married, though they did go through a so-called celestial plural marriage ceremony which was forbidden by the law of the state where it took place, or intend to go through such ceremony with the intent and purpose of living and cohabitating with her, constitutes in law transportation for the purpose of her becoming his mistress and therefore contravenes the Act. Cf. Caminetti v. United States, supra.

The case of Mortensen v. United States, 322 U. S. 369, is not to the contrary. There the accused husband and wife were engaged in the operation of a house of prostitution. They planned an automobile trip to visit the parents of the wife. Two girls employed by them as prostitutes requested to be taken along for a vacation. The four made the interstate trip by motor. After their return, the girls resumed their immoral conduct. It was held that the trip must be treated in its entirety as one of recreation and holiday; that it could not be arbitrarily split into separate parts and

viewed differently; and that since no immoral purpose was contemplated, the statute did not apply. Manifestly, no comparable situation is presented here.

The judgments are attacked on the further ground that they interfere with the freedom of religion. It is argued that the defendants below believe the Divinity and Doctrines of Joseph Smith as published by the early Mormon Church; that they accept those doctrines as their religious guide; and that such doctrines approve plural marriages. The First Amendment to the Constitution provides in effect that Congress shall not enact any law which interferes with the free [fol. 1451] exercise of religion. But the interdiction relates to legislation in respect to religious belief. It does not withhold power to enact legislation forbidding practices arising out of religious opinion. The right to engage in a practice which violates a forbidding Act of Congress valid in other respects cannot be asserted with success merely because the practice arises out of religious conviction. Reynolds v. United States, 98 U. S. 145. The transportation in commerce of a woman to whom the accused is not married, although they did go through a celestial ceremony of plural marriage forbidden by the law of the state, or intend to go through such ceremony, for the purpose of living and cohabiting with her as man and wife, is a practice which Congress has the constitutional power in its protection of commerce to penalize. Caminetti v. United States, supra.

The next contention is that there was no intent to transport the women and girls named in the indictment across state lines for the purpose of prostitution or debauchery. Except in the case of certain statutory offenses, a criminal intent is generally an element of crime; but every person is presumed to intend the necessary and legitimate consequences of that which he does, and it is no defense to a penal act, knowingly and intentionally committed, that it was done with an innocent intent. Gates v. United States, 122 F. (2d) 571, certiorari denied, 314 U. S. 698.

The judgments in the case charging a violation of the Kidnapping Act, supra, are assailed on the ground that the Act is inapplicable to a case of this kind. The Act is not confined to the transportation in interstate commerce of a person who has been kidnapped by physical force and is being unlawfully restrained in order that his captor might secure for himself payment of a pecuniary consideration or something else of material value. Gooch v. United States,

297 U. S. 124. In presently material respect, it makes it unlawful knowingly to transport or cause to be transported, or aid or abet in transporting, in commerce any person who shall have been unlawfully inveigled, decoyed, or carried away for ransom or reward or otherwise. Here, the girl named in the indictment was fourteen years old, but she had the mentality of a child only seven years of age. After one of the defendants and the girl had gone through a celes- [fol. 146] tial ceremony while she was employed as a domestic in his household, after she had become pregnant by him, after she had been placed in the custody of state authorities but subject to the continuing jurisdiction of the court, after she had escaped, and after she had gone to the home of the other two defendants, the three defendants transported her in commerce in order that she might remain in hiding from the court and the Welfare Department and continue to live and cohabit with the defendant in whose home she had been employed. We think it requires no amplification or elucidation to make plain that these acts and the inferences fairly to be drawn from them, considered in their totality, constituted the transportation in commerce of a person who had been inveigled, decoyed, and carried away in order that one of the defendants might secure a benefit to himself, within the meaning of the Act.

It remains to inquire whether any right of the defendants in respect to the filing of motions for new trial was infringed. Rule 1 of the Rules of Practice and Procedure, after plea of guilty, verdict or finding of guilt, in Criminal Cases, 292 U. S. 661, 18 U. S. C. A. following § 688, provides among other things that after a finding of guilt by the trial court where a jury has been waived sentence shall be imposed without delay, unless a motion for a new trial is pending; and Rule 2 provides that motions for a new trial shall be made within three days after the finding of guilt, except that such motions based solely upon the ground of newly-discovered evidence may be made within sixty days after final judgment. After these cases were submitted, the trial court took them under advisement. Thereafter the court filed a written opinion in which the several defendants were adjudged to be guilty of the charges laid in the indictments. The opinion directed that a journal entry be entered to that effect, and that the defendants might remain at libery on their respective bonds, subject to such order as might be made for their appearance for final judgment. Something

more than two weeks later the cases were taken up again, the defendants being present. The court entered formal verdicts of guilty, and then indicated its purpose to impose sentence and enter final judgment. The attorneys for the defendants expressed a desire to file motions for new trial. [fol. 147] In the course of discussion between the court and the attorneys, the court announced:

> "My point is I am here ready to sentence now. If you want to file your motion for a new trial—it says you must file them promptly—you have had two weeks. If you want to do that now you may do it and I will dispose of them at once and then sentence. If you want to defer that, I will sentence now and you can file your motion afterwards. You can use your own judgment in respect to it."

After further discussion, the court recessed until afternoon, and then imposed the sentences. But no motions were filed, then or later. It is clear that there was no infringement upon the right of the defendants to file their motions at any time during the period fixed by the rule.

The judgments are severally Affirmed.

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IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT, CASE NO. 2945

Twenty-eighth Day, November Term, Thursday, January 4th, A. D. 1945. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Utah and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Heber Kimball Cleveland, appellant, surrender himself to the custody of the United States Marshal for the District of Utah, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

[fol. 148] In United States Circuit Court of Appeals

Judgment, Case No. 2946

Twenty-eighth Day, November Term, Thursday, January 4th, A. D. 1945. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Utah and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Heber Kimball Cleveland, appellant, surrender himself to the custody of the United States Marshal for the District of Utah, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

---

In United States Circuit Court of Appeals

Judgment, Case No. 2947

Twenty-eighth Day, November Term, Thursday, January 4th, A. D. 1945. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

This cauce came on to be heard on the transcript of the record from the District Court of the United States for the District of Utah and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Heber Kimball Cleveland, appellant, surrender himself to the custody of the United States Marshal for the District of Utah, in execution of the judgment and sentence imposed upon him within ten [fol. 149] days from and after the date of the filing of the mandate of this court in said district court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT, CASE NO. 2948

Twenty-eighth Day, November Term, Thursday, January 4th, A. D. 1945. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Utah and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that David Brigham Darger, appellant, surrender himself to the custody of the United States Marshal for the District of Utah, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

---

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT, CASE NO. 2949

Twenty-eighth Day, November Term, Thursday, January 4th, A. D. 1945. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Utah and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Vergel Y. Jessop, [fol. 150] appellant, surrender himself to the custody of the United States Marshal for the District of Utah, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT, CASE NO. 2950

Twenty-eighth Day, November Term, Thursday, January 4th, A. D. 1945. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Utah and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that William Chatwin, appellant, surrender himself to the custody of the United States Marshal for the District of Utah, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

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IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT, CASE NO. 2951

Twenty-eighth Day, November Term, Thursday, January 4th, A. D. 1945. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Utah and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the [fol. 151] said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Charles F. Zitting, appellant, surrender himself to the custody of the United States Marshal for the District of Utah, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT, CASE NO. 2952

Twenty-eighth Day, November Term, Thursday, January 4th, A. D. 1945. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Utah and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Edna Christensen, appellant, surrender herself to the custody of the United States Marshal for the District of Utah, in execution of the judgment and sentence imposed upon her, within ten days from and after the date of the filing of the mandate of this court in said district court.

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IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT, CASE NO. 2953

Twenty-eighth Day, November Term, Thursday, January 4th A. D. 1945. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Utah and was argued by counsel.

[fol. 152] On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Theral Ray Dockstader, appellant, surrender himself to the custody of the United States Marshal for the District of Utah, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

## In United States Circuit Court of Appeals

### Judgment, Case No. 2954

Twenty-eighth Day, November Term, Thursday, January 4th, A. D. 1945. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Utah and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that L. R. Stubbs, appellant, surrender himself to the custody of the United States Marshal for the District of Utah, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

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## In United States Circuit Court of Appeals

### Judgment, Case No. 2955

Twenty-eighth Day, November Term, Thursday, January 4th, A. D. 1945. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

[fol. 153-154] This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Utah and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Follis Gardner Petty, appellant, surrender himself to the custody of the United States Marshal for the District of Utah, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATES

Twenty-ninth Day, November Term, Friday, January 5th, A. D. 1945. Before Honorable Orie L. Phillips, Circuit Judge.

These causes came on to be heard on the motion of appellants for a stay of the mandate herein.

On consideration whereof, it is now here ordered that said motion be and the same is hereby granted and that no mandates of this court enter herein for a period of thirty days from this day, and that, if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under section 3 of rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the cases by the Supreme Court.

• • • • • • •

Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 155] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1945

No. 23

• • • • • • •

ORDER ALLOWING CERTIORARI—Filed March 12, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 156] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1945

No. 24

• • • • • • •

ORDER ALLOWING CERTIORARI—Filed March 12, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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[fol. 157] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1945

No. 25

• • • • • • •

ORDER ALLOWING CERTIORARI—Filed March 12, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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[fol. 158] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1945

No. 26

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ORDER ALLOWING CERTIORARI—Filed March 12, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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[fol. 159] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1945

No. 27

* * * * * * *

ORDER ALLOWING CERTIORARI—Filed March 12, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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[fol. 160] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1945

No. 28

* * * * * * *

ORDER ALLOWING CERTIORARI—Filed March 12, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 161] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1945

No. 29

* * * * * * *

ORDER ALLOWING CERTIORARI—Filed March 12, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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[fol. 162] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1945

No. 30

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ORDER ALLOWING CERTIORARI—Filed March 12, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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[fol. 163] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1945

No. 31

* * * * * * *

ORDER ALLOWING CERTIORARI—Filed March 12, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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[fol. 164] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1945

No. 32

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ORDER ALLOWING CERTIORARI—Filed March 12, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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[fol. 165] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1945

No. 33

* * * * * * *

ORDER ALLOWING CERTIORARI—Filed March 12, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter O. A. Tangren. File Nos. 49,348, 49,349, 49,350, 49,351, 49,352, 49,353, 49,354, 49,355, 49,356, 49,357, 49,358. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 23, Heber Kimball Cleveland, Petitioner, vs. The United States of America. Term No. 24, Heber Kimball Cleveland, Petitioner, vs. The United

States of America. Term No. 25, Heber Kimball Cleveland, Petitioner, vs. The United States of America. Term No. 26, David Brigham Darger, Petitioner, vs. The United States of America. Term No. 27, Vergel Y. Jessop, Petitioner, vs. The United States of America. Term No. 28, Theral Ray Dockstader, Petitioner, vs. The United States of America. Term No. 29, L. R. Stubbs, Petitioner, vs. The United States of America. Term No. 30, Follis Gardner Petty, Petitioner, vs. The United States of America. Term No. 31, William Chatwin, Petitioner, vs. The United States of America. Term No. 32, Charles F. Zitting, Petitioner, vs. The United States of America. Term No. 33, Edna Christensen, Petitioner, vs. The United States of America. Petition for writs of certiorari and exhibit thereto. Filed January 30, 1945. Term Nos. 23 O. T. 1945. 24 O. T. 1945. 25 O. T. 1945. 26 O. T. 1945. 27 O. T. 1945. 28 O. T. 1945. 29 O. T. 1945. 30 O. T. 1945. 31 O. T. 1945. 32 O. T. 1945. 33 O. T. 1945.

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JAN. 30 1945
CHARLES ELMORE CROPLEY
CLERK

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1944**

12-19

No. ~~895~~ 23-33

HEBER KIMBALL CLEVELAND,

*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA

No. ~~896~~

HEBER KIMBALL CLEVELAND,

*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA

No. ~~897~~

HEBER KIMBALL CLEVELAND,

*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA

No. ~~898~~

DAVID BRIGHAM DARGER,

*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA

[CONTINUED ON SECOND PAGE OF COVER]

## PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

CLAUDE T. BARNES,
J. H. MCKNIGHT,
KNOX PATTERSON,
ED. D. HATCH,
O. A. TANGREN,
*Counsel for Petitioners.*

[CONTINUED FROM FIRST PAGE OF COVER]

**No. 899**

VERGEL Y. JESSOP, *Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA

**No. 900**

THERAL RAY DOCKSTADER, *Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA

**No. 901**

L. R. STUBBS, *Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA

**No. 902**

FOLLIS GARDNER PETTY, *Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA

**No. 903**

WILLIAM CHATWIN, *Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA

**No. 904**

CHARLES F. ZITTING, *Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA

**No. 905**

EDNA CHRISTENSEN, *Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA

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# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1944

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**No. 895**

HEBER KIMBALL CLEVELAND,

*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA

**No. 896**

HEBER KIMBALL CLEVELAND,

*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA

**No. 897**

HEBER KIMBALL CLEVELAND,

*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA

**No. 898**

DAVID BRIGHAM DARGER,

*Petitioner.*

*vs.*

THE UNITED STATES OF AMERICA

**No. 899**

VERGEL Y. JESSOP,

*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA

**No. 900**

THERAL RAY DOCKSTADER,

*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA

**No. 901**

L. R. STUBBS,

*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA

**No. 902**
FOLLIS GARDNER PETTY,
*Petitioner,*
*vs.*
THE UNITED STATES OF AMERICA

**No. 903**
WILLIAM CHATWIN,
*Petitioner,*
*vs.*
THE UNITED STATES OF AMERICA

**No. 904**
CHARLES F. ZITTING,
*Petitioner,*
*vs.*
THE UNITED STATES OF AMERICA

**No. 905**
EDNA CHRISTENSEN,
*Petitioner,*
*vs.*
THE UNITED STATES OF AMERICA

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# PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

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*To the Honorables, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Your petitioners, Heber Kimball Cleveland, David Brigham Darger, Vergel Y. Jessop, Theral Ray Dockstader, L. R. Stubbs, Follis Gardner Petty, William Chatwin, Charles F. Zitting and Edna Christensen, respectfully submit their petition for writs of certiorari to review the decree of the United States Circuit Court of Appeals from the Tenth Circuit in the above entitled case.

The Circuit Court of Appeals for the Tenth Circuit has affirmed the decision and judgment of the District Court of the United States for the District of Utah, Central Division, finding the appellants guilty and imposing sentence upon them.

## Statement of the Cases

These are separate appeals from the judgment of guilty and imposition of sentence by the District Court. The several cases are laid under either the Mann Act, or the Lindberg Act,

One of the primary issues involved is: Does either of said Acts have application to the respective cases in which they form the basis of the charges?

In the Mann Act Cases it is stipulated that the testimony of the Government, if presented would be to the effect that plural marriage, polygamy in common parlance, but in truth that form of plural marriage designated by the revelations of Joseph Smith, the "Mormon" Prophet as "Celestial Marriage", was the status of the defendants, during the course of which they transported such plural, or "celestial" wife or wives across State lines. To such each defendant entered a plea of "Not Guilty", which still is of full effect.

In the Lindberg Act Cases, the testimony of the Government is stipulated in like manner, with like pleas entered. In these cases, however, no plurality of marriage was either in esse at the time of the transportation, or given effect or entered into during or at the termination of the transport. There the stipulated testimony would not show a polygamous relation entered into by reason of such transport.

In each case where "celestial" marriage is an issue, it is further stipulated that the relationship was the result of the sincere religious belief of each defendant that they were, in fact, obeying the very command of God.

In no case, save one, does it appear that the status of either defendant or any "celestial wife" was altered over its establishment prior to the transportation in interstate travel.

In but one case, (No. 2945, Record p. 7), does any plural, or "celestial" marriage appear as entered into subsequently to any interstate journey. That is the case of *United States* v. *Cleveland*, No. 2945, in which it appears that the "celestial marriage" was performed some days following the transportation, in the State to which the transport was made, during which interim no sexual relationship was engaged in, though the opportunity was fully present and apparent.

In the Lindberg Act cases, the stipulated testimony of the Government shows no transportation for the purpose of any marriage in plurality. There the husband was a single man; the wife was a single girl, and the purpose of the transportation was to have a marriage performed between them in a state where such marriage would be regarded as being lawful. No "celestial" or polygamous marriage is there involved, as any issue relating to the transportation of the subsequent legal wife.

In every case, stipulation as to what the testimony of witnesses for the Government would show was entered into.

In every case a plea of "Not Guilty" was entered. No such plea is yet withdrawn or altered.

Jury was waived in every case, and every case was submitted to the trial court upon such stipulated Government testimony and such pleas of Not Guilty.

The trial Court found every defendant guilty as charged; denying time beyond a few hours, in which to prepare, serve and file motions for new trials.

The Circuit Court of Appeals, 10th Circuit, has affirmed the findings and sentence of the trial court in every case.

All of the cases were consolidated for trial: and all were so consolidated on appeal to the Circuit Court of Appeals, and all were treated and considered under such consolidations by each said Court.

These cases are here consolidated in the like manner in this petition.

The reasons for such consolidations are these:

Motions to Quash, except for incidental matters, are identical;

The Trial Court's decision embraced each case;

The Stipulations, in the main are alike, although they differ in some of their details;

In each case the same Constitutional questions were put in issue;

In each case, the identical claim of right under the 9th Article of the Treaty of Guadalupe-Hidalgo is put in issue;

In each case the applicability of each, the Mann Act or the Lindberg Act, respectively, was made an issue;

In each case the issue of the requisite criminal intent was put in issue, as the same must be found resident in the same mind at the same time with the religious belief as to the verities of "celestial marriage" as an actual command of the Almighty;

In each case, the criminal intent requisite to a finding of guilt of intent to "prostitute" a woman, or women, or to "debauch" a woman, or women, was put in issue;

In each case, the applicability of the rule of "*ejusdem generis*" was put in issue;

In each case, the power of the Federal Government to declare upon the morals or marriage was put in issue;

In each case the power of the Federal Government to regulate the practice of, or punish any form of marriage, was put in issue;

In each case, whether or not the facts sufficiently showed the charge to be *malum in se*, or *malum prohibitum* only, was made an issue;

In each case, the power of the Federal Government to proscribe, in areas other than those in which it has exclusive jurisdiction, a form or type of marriage, or to punish therefor, was made an issue;

In each case the power of the Federal Government to regulate, in States, or proscribe acts *malum in se* was put in issue;

In each case, the controlling "purpose" and design of each defendant was put in issue;

In each case, the issue of the power of the Federal Government to proscribe, and punish for, a marital status, was put in issue;

In each case, the power of the Government to declare upon the truth and verity of a religious doctrine is put in issue;

Other issues are also identical in the several cases.

## Questions Presented

The record presents these questions: As to the Mann Act cases:

1. Is the Mann Act to be applied to persons already having a status in plural, "celestial", religious marriage, resident in a State, when they cross state lines accompanied by, or are joined in another State by, a plural wife of the like status, all the while each such person being of sincere and devout religious belief that such is a status ordained of God?

2. Can one, entertaining the religious belief, as taught and enjoined by the Prophet Joseph Smith, and so practicing such religiously, at the same time have resident in him

the criminal intent to "prostitute" or to "debauch" requisite to being found guilty under the Mann Act?

3. Does the Federal Government have the power to declare upon the verities of a religious tenet?

4. Does the Federal Government have the power to declare upon the morals of a religious practice?

5. Does the Mann Act apply to a form of marriage, religiously believed to be the "command of God"?

6. Does the stipulated testimony show an act malum in se?

7. Does the Federal Government have jurisdiction, within the areas of States of the Union, to declare a marriage, no matter what its form or basis, prohibited by the Mann Act, where the same is entered into in good faith and for religious reasons?

8. Can the violation of a State prohibitory law, supply the criminal intent necessary to a charged violation of the Mann Act?

9. If issue number 8 be affirmed: Then would it make any difference that such act was done in sincere religious practice of a claimed "command of God"?

10. Do these defendants have any claimable right under the Ninth Article of the Treaty of Guadalupe-Hidalgo?

11. May the Federal Government proscribe a religious belief and practice of a religious marriage practice, and punish therefor?

12. Was any intent resident in the defendants in the cases laid under the Lindbergh Act to enter into any plural marriage?

13. (a) Is the Lindbergh Act applicable to a man who, to make a pregnant girl his legal wife, takes her across

State lines for such purpose despite the non-consent thereto of her parents, she being not sui juris?

(b) Does a prior marriage, not recognized by the law of the State, between such man and pregnant girl, in any wise affect the interstate travel so as to bring the matter within the inhibitions of the Lindbergh Act?

14. As to case No. 2945, *United States* v. *Cleveland*, does an intent to take a woman across State lines, there to await a religious ceremony of marriage sincerely believed in by both the woman and the man as the "command of God," and not having sexual relations until after such ceremony; and with no thought of termination of that relationship for both "time and eternity," and with the religious belief that any sexual relation of the woman thereafter with any other man would render her deserving of death, give rise to that criminal intent to either "prostitute" or "debauch" such woman within the meaning, purpose and intent of the Mann Act?

The decision ignores the fact that it is the sole prerogative of the respective States of this Union to legislate upon the subject of marriage; that polygamy is not a common law offense; that polygamy is not malum in se, but is merely malum prohibitum; that hence, its practice cannot supply the requisite criminal intent under the Mann Act.

The decision further ignores the fact that these parties, with the one exception in case No. 2945, for long had been in an established marital status in the state of Utah, prior to any interstate travel by them, and that, therefore, sexual intercourse, if indulged in the State to which they traveled was but an incident to their established status, not the "purpose" actuating the travel interstate; that such could not be any form of "prostitution" or "debauchery" proscribed by the Mann Act.

In this regard the decision, in effect, reverses the previous decisions of said Circuit Court of Appeals in the cases of:

*Yoder* v. *United States*, 80 F. 2d 665 (CCA 10th);
*Drosser* v. *United States*, 16 F. 2d 833 (CCA 10th);

as well as other cases to the like effect, viz:

*Van Felt* v. *United States*, 240 F. 346 (CCA 4th);
*Sloan* v. *United States*, 287 F. 91 (CCA 8th),

and the decision disregards the last word of this Court in the case of:

*Mortensen* v. *United States*, 64 S. Ct. 1037, 322 U. S. 369,

and the declarations of this Court in

*United States* v. *Ballard*, 322 U. S. 78, 64 S. Ct. 882,

and the declarations of no inference against religion stated in:

*Church of the Holy Trinity* v. *United States*, 143 U. S. 457.

The decision here is in conflict with the decisions of this Court; and it involves the important question of how far the Federal Government may look into and regulate and declare upon the verities and morals of divers forms of marriage in its enforcement of the Mann Act, and the Lindbergh Act, matters not yet determined.

WHEREFORE, your Petitioners respectfully pray that writs of certiorari issue herein under the seal of this Court directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the Circuit Court of Appeals had in said causes, to the end that these causes

may be reviewed and determined by this Honorable Court as provided by the Statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by this Honorable Court, and for such further relief as to this Court may seem proper.

HEBER KIMBALL CLEVELAND,
DAVID BRIGHAM DARGER,
VERGEL Y. JESSOP,
THERAL RAY DOCKSTADER,
L. R. STUBBS,
FOLLIS GARDNER PETTY,
WILLIAM CHATWIN,
CHARLES F. ZITTING,
EDNA CHRISTENSEN.

CLAUDE T. BARNES,
J. H. MCKNIGHT,
KNOX PATTERSON,
EDWIN D. HATCH,
O. A. TANGREN,
*Counsel.*

**Affidavit of Verification of Petition for Certiorari**

UNITED STATES OF AMERICA,
State of Utah,
County of Salt Lake, ss:

HEBER KIMBALL CLEVELAND, being duly sworn, deposes and says: I am one of the petitioners in the above entitled action, and by authority make this verification for and in behalf of all of the petitioners. I have read the foregoing petition and the same is true as I verily believe.

HEBER KIMBALL CLEVELAND.

Sworn to before me this 17 day of January, 1945.

NEPHI JENSEN,
[Seal.] *Notary Public.*
Residing at Salt Lake City, Utah.

**Certificate of Counsel**

We hereby certify that we have examined the foregoing petition for a writ of certiorari, and in our opinion such petition is well founded and should be granted by this Honorable Court, and said petition is not presented for purposes of delay.

CLAUDE T. BARNES,
J. H. MCKNIGHT,
KNOX PATTERSON,
EDWIN D. HATCH,
O. A. TANGREN,
*Counsel for Petitioners.*

## BRIEF SUPPORTING APPLICATION FOR WRITS OF CERTIORARI

The opinion in the District Court of the United States for the District of Utah in the foregoing cases was rendered May 22, 1944, by Judge T. Blake Kennedy and is reproduced in full in the Clerk's Transcripts of Records (p. 15); The opinion of the Circuit Court of Appeals for the Tenth Circuit was rendered on January 4, 1945, by Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Court Judges; and it is given in full in the Record herein at page 139 et seq. So far as we know the opinions have not yet been published.

### Statement of Jurisdiction Ground

The jurisdiction of the Supreme Court of the United States to review by writ of certiorari the judgment and decision entered in this cause is conferred by Act of Congress February 13, 1925, C. 229, p. 1, 43 Stat. 938; Judicial Code p. 240 amended; 28 U. S. C. A. p. 347, commonly known as "Certiorari to Circuit Courts of Appeals".

### Statutes Involved

The statutes, the applicability of which is involved, are: the white slave or Mann Act (Act of Congress of June 25, 1910, C. 395 P 2, 36 Stat. 825, 18 USCA S. 398) as follows:

> Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall

knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any Territory or the District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any Territory or the District of Columbia, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

and the Kidnapping Act (Act of Congress of June 22, 1932, C. 271, P. 1, 47 Stat. 326, as amended May 18, 1934, C. 301, 48 Stat. 781, 18 USCA S 408 a) as follows:

Whoever shall knowingly transport or cause to be transported, or aid or abet in transporting, in interstate or foreign commerce, any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away by any means whatsoever and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall, upon conviction, be punished (1) by death if the verdict of the jury shall so recommend, provided that the sentence of death shall not be imposed by the court if, prior to its imposition, the kidnaped person has been liberated unharmed, or (2) if the death penalty shall not apply nor be imposed the convicted person shall be punished by imprisonment in the penitentiary for such term of years as the court in its discretion shall determine: Provided, That the failure to release such person within seven days after he shall

have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away shall create a presumption that such person has been transported in interstate or foreign commerce, but such presumption shall not be conclusive.

Treaty of Peace (Etc.) of Guadalupe Hidalgo February 2, 1848, between Republic of Mexico and the United States (7 Fed. Stat. Ann. p. 694-703):

Article IX: "The Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States according the principles of the Constitution; and in the meantime shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction."

## Judgment and Decision Involved

The judgment and decision involved is that rendered by the Circuit Court of Appeals (Tenth Circuit) on January 4, 1945, affirming the judgment and sentences of the District Court of the United States for the Central Division of Utah, rendered June 7, 1944.

The defendants were practicing celestial marriage under the doctrines of the original Mormon Church, and these cases are the attempt of the government to apply the Mann Act and the Kidnapping Act to them. The cases were all submitted to the Court on stipulations concerning what the government's testimony would be; juries were waived; not guilty pleas were entered; the Court rendered its decision and verdict in one consolidated case opinion. The cases were thus consolidated on appeal for the short stipu-

lations all brought up the essential fact that the defendants were already "married" under the religious belief before crossing state lines and most of them already had children.

Every step of the way the defendants urged their rights and immunities under the first, fifth, sixth and fourteenth Amendments to the Constitution of the United States; and maintained that since control of marriage was never delegated by the states to the federal government, the federal government cannot choose which form of marriage it will recognize in the enforcement of the Mann Act and the Lindbergh Act.

Every step of the way the defendants urged their rights under the provisions of the treaty of Guadalupe Hidalgo, but they were ignored.

**Cases Sustaining Jurisdiction**

This Court has unquestioned jurisdiction to review by certiorari White Slave Act cases where the question of "purpose", "intent" and the applicability of the statute to the testimony is involved—

*Caminetti* v. *U. S.* (Cal. 1917) 37 S. Ct. 192, 242 U. S. 470, 61 L. Ed. 442, L.R.A. 1917 T, 502, Ann. Cas. 1917 B. 1168.

*Mortensen* v. *U. S.*, 1944, 64 S. Ct. 1037, 88 L. Ed. —.

*Gooch* v. *U. S.* (1936), 56 S. Ct. 395, 297 U. S. 124, 80 L. Ed. 522.

The Application for Writ of Certiorari Is Timely Taken.

The judgment of the Circuit Court of Appeals was entered on January 4, 1945, and on January 5, 1945, the said Court entered an order staying the mandates in each of the cases for a period of thirty days to give petitioners time to file a certiorari petition, record and brief in this Court and file with the Clerk of said Circuit Court the Certificate of the Clerk of the Supreme Court of the United States to that effect.

## The Facts

The facts are set forth in the Record at pages 7, 67, 97, 116, 129; and are summarized in the opinion of the Circuit Court of Appeals (Record p. 140). In the Mann Act cases the facts all amount to this: the defendants (except in one case) before crossing state lines were already "married" to the women involved by a celestial ceremony of the original Mormon Church, but a marriage illegal under the laws of Utah; and in the one case a "marriage" of like character took place after the crossing of a state line and before sexual intercourse. In the Kidnapping Case the girl involved was subnormal mentally but "married" by this ceremony and pregnant before crossing a state line with her mate to get legal marriage performed.

## Errors to Be Urged

I

The Court erred in affirming the Court's failure and refusal to grant the defendant's Motion to Quash the information in said cause.

II

The Court erred in affirming the Court's failure and refusal to find that the grand jury, finding the True Bill in said cause, was prejudiced and biased against this defendant.

III

The Court erred in finding the facts in the case, and the prosecution thereof, were applicable to Section 398, T. 18 U.S.C.A., known as the Mann Act.

IV

The Court erred in denying defendants' constitutional rights, under the Constitution of the State of Utah, under

Article 1, sections 1, 4, 7, 11, 12 and 24; Article 3, and Article 6, sub-sections 5 and 18; and likewise erred in denying defendants' constitutional rights under the 1st, 4th, 5th, 6th, 8th and 14th amendments to the Constitution of the United States.

V

The Court erred in disregarding defendants' rights under the Treaty of Guadalupe Hidalgo, in the free exercise of his religion.

VI

The Court erred in finding defendants had criminal intent in the commission of the acts charged in the informations, and shown by the stipulated testimony in said causes.

VII

The Court erred in finding that defendants violated the laws of the State of Utah, in connection with Federal statutes so authorizing federal prosecution.

VIII

The Court erred in failing to pass upon the issue, that the transportation of plural wives, as shown by the stipulated testimony in said cause, did or did not constitute prostitution or debauchery.

IX

The Court erred in finding that the doctrine of ejusdem generis had no application under the so-called Mann Act.

X

The Court erred in finding defendants guilty under the charges as laid down under the stipulated testimony in the case against the pleas of not guilty.

XI

The Court erred in finding that defendants were guilty of overt acts under the Mann Act, after having entered the status of religious plural marriage.

XII

The Court erred in failing to find that the commission of the acts charged under the stipulated testimony, were the result of honest, Christian and Biblical religious belief.

XIII

(a) The Court erred in finding defendants guilty because defendants violated a state statute, and that such violations alone constituted prostitution and debauchery.

(b) And the Court erred in this by reason of entire lack of jurisdiction under or by reason of the prohibitions of a state statute.

XIV

The Court erred in passing upon the morals, or the contrary, involved in a marriage relation, such being a peculiar and exclusive prerogative of State Legislators and State Courts.

XV

The Court erred in declaring upon the status of a marriage, stipulated to have been entered into under sincere religious belief in its validity by contracting parties; and is, and was, wholly without any jurisdiction so to adjudicate.

XVI

The Court erred in passing upon the verity of a religious tenet.

**Reasons Why the Writs Should Be Granted**

The Circuit Court of Appeals has held, by inescapable interpretation and construction, that the religious practice of "celestial marriage" as declared to be the "command of God" by the Prophet Joseph Smith, and as avowed to be such by the authorative "Doctrine and Covenants" of the "Mormon" Church, to this day, is a form of immorality, condemned by the general words "other immoral practice" contained in the Mann Act. That Court has *not* said that the same is a form of either "prostitution" or "debauchery," the specific forms of vice condemned by that statute.

To have reached such determination the following elements *must* precede as the inescapable basis therefor, viz:

(a) The "Revelation" to the Prophet Joseph Smith is not, in fact the word of God; for the word of God cannot require any immorality;

So that Court has passed upon the verity of that religious dogma and tenet, contrary to every prior declaration as to that power by this Court.

(b) Finding that "Revelation" to be false, that the practice of its requirements constitutes a form of immorality akin to "prostitution" or "debauchery," covered by the unlimited phrase "any other immoral practice" in the statute.

(c) That such being within the prohibition of the Mann Act, the doing of the prohibited act there banned, gives rise to the necessary criminal intent, viz: that the knowing violation of a prohibitory statute, sufficiently shows the criminal intent, without further proof of the mala fides and the character of the act as being *malum in se*.

All of which is quite in disregard of the rule of ejusdem generis; is inescapably necessary to make the *Reynolds*

case have application; is in disregard of the facts of the *Caminette* case, in which no religious issue was present; in contra to the decision of the Circuit Court of Appeals in the case of *Lewis* v. *United States*, 110 F. 2d 460, and the exact wording of the *Caminetti* case (242 U. S. 470), in which it is held that it is a *class* of conduct that the statute bans; is contrary to the declared purpose and scope of the statute set out in the *Mortensen* case (322 U. S. 369), and requires that the verities of the "revelation" be first declared upon as a matter of judicially determined ultimate fact.

These items of reasoning, forming the basis of this opinion and holding of the Circuit Court of Appeals, and its inescapable result, viz: the declaration by the Court upon the verities and morals of a religious tenet of more than a million American citizens (though but a few dissenters from that faith are here for punishment), the charlatanry or the God-inspired character of the Prophet Joseph Smith, and the verities of every one of those religious tenets announced by him (either as the true Prophet of God, or as a great religious deceiver), as being wholly false, or wholly true and so wholly moral or wholly immoral, presents a novel construction of law, heretofore condemned by this Honorable Court at every occasion when it has been before it, and the uniform holdings of this Court that religious truths may not be inquired into, much less judicially determined, by any Court.

That it is held in the *Reynolds* case, that religious belief does not supply a legal basis for transgression of the prohibitions of a police measure, is without force here, unless it be first declared that this Mann Act is a police measure; unless it be further held that religious forms of marriage which fail to conform to the generality of concept of the majority are, as a matter of law, immoral, and the religious concept thereof and travel thereunder in a continuance of

the status long theretofore established a matter of interstate commerce, within the meaning of the Constitutional powers.

That this particular form of marriage is here involved, means not that other form, generally held in disrespect, cannot be so ruled upon. By legislative enactment, should this conviction be upheld, it is quite possible that all marriages might be held to be immoral unless consummated before a priest of a selected religious organization, and so immoral, and so all people not conforming to the State Religion in such phase, sent to jail on crossing state lines after such marriage not by such established religious form and priest.

And so, we say: These cases are of such great public moment; the inescapable basic reasoning underlying their decision by the Circuit Court is of such a character as to require that the whole matter be here reviewed.

No person carrying his legal wife across state lines can be prosecuted under the Mann Act, we believe.

That relieves a "married" man from the penalties of the statute.

To support this opinion and to affirm this decision, the Federal Courts,—the Federal Government—must assume the prerogative of and the power to declare upon what form, or forms, of "marriage" it will countenance; and contrary-wise: what forms of "marriage" it will uphold as moral, and what forms of the same it will hold to be immoral.

To uphold this decision: All forms of travel by married or unmarried persons must be held to be within the meaning of the word "commerce" as used in the Mann Act, and so authorized by the grant of power to regulate interstate commerce made to the Federal Government. So to hold will be to expand that term and that power further than ever

it has been heretofore; will be to cover every type and form of travel, for whatever purpose, and with whatever object, across state lines; to expand that term to an extent hardly contemplated by the Fathers when the power to regulate what they deemed to be "commerce" was granted.

The issues here for determination are, we say: Quite novel and so deserving of the full deliberation on and determination by this Honorable Court.

Respectfully submitted,

CLAUDE T. BARNES,
J. H. MCKNIGHT,
KNOX PATTERSON,
EDWIN D. HATCH,
O. A. TANGREN,
*Counsel for Petitioners.*

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CLERK

# BRIEF OF PETITIONERS

## Supreme Court of the United States

OCTOBER TERM, 1945

No. [redacted] 12-19

HEBER KIMBALL CLEVELAND, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

No. 24

HEBER KIMBALL CLEVELAND, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

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vs.

THE UNITED STATES OF AMERICA

No. 26

DAVID BRIGHAM DARGER, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

No. 27

VERGIL V. JESSOP, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

(CONTINUED ON SECOND COVER)

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH DISTRICT

PETITION FOR CERTIORARI FILED JANUARY 26, 1945.
CERTIORARI GRANTED MARCH 12, 1945.

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1945**

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**No. 23**

HEBER KIMBALL CLEVELAND, PETITIONER,

*vs.*

THE UNITED STATES OF AMERICA

**No. 24**

HEBER KIMBALL CLEVELAND, PETITIONER,

*vs.*

THE UNITED STATES OF AMERICA

**No. 25**

HEBER KIMBALL CLEVELAND, PETITIONER,

*vs.*

THE UNITED STATES OF AMERICA

**No. 26**

DAVID BRIGHAM DARGER, PETITIONER,

*vs.*

THE UNITED STATES OF AMERICA

**No. 27**

VERGEL Y. JESSOP, PETITIONER,

*vs.*

THE UNITED STATES OF AMERICA

**No. 28**

THERAL RAY DOCKSTADER, PETITIONER,

*vs.*

THE UNITED STATES OF AMERICA

**No. 29**

L. R. STUBBS, PETITIONER,

*vs.*

THE UNITED STATES OF AMERICA

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FOLLIS GARDNER PETTY, PETITIONER,

*vs.*

THE UNITED STATES OF AMERICA

**No. 31**

WILLIAM CHATWIN, PETITIONER,

*vs.*

THE UNITED STATES OF AMERICA

**No. 32**

CHARLES F. ZITTING, PETITIONER,

*vs.*

THE UNITED STATES OF AMERICA

**No. 33**

EDNA CHRISTENSEN, PETITIONER,

*vs.*

THE UNITED STATES OF AMERICA

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH DISTRICT

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## STATUTES CITED


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# BRIEF OF PETITIONERS

## OPINIONS BELOW

U. S. v. Cleveland, D. C., Utah, 1944, 56 F. Supp. 890.
U. S. v. Cleveland (C.C.A. 10), 146 F. 2d 730.

## STATUTES INVOLVED

Section 2 of the Act of June 25, 1910, c. 395, 36 Stat. 825 (18 U. S. C. 398), known as the Mann Act, provides in part:

> Sec. 2. That any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, * * * any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; * * * shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years; or by both such fine and imprisonment, in the discretion of the court.

The Federal Kidnaping Act of June 22, 1932, c. 271, 47 Stat. 326, as amended by the Act of May 18, 1934, c. 301, 48 Stat. 781 (18 U. S. C. 408a), provides in pertinent part as follows:

> Sec. 1. Whoever shall knowingly transport or cause to be transported, or aid or abet in transporting, in interstate or foreign commerce, any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away by any means whatsoever and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall, upon conviction, be punished (1) by death if the verdict of the jury shall so recommend, provided that the sentence of death shall not be imposed by the court if, prior to its imposition, the kidnaped person has been liberated unharmed, or

(2) if the death penalty shall not apply nor be imposed the convicted person shall be punished by imprisonment in the penitentiary for such term of years as the court in its discretion shall determine:

* * *

## JURISDICTIONAL STATEMENT

These cases involve the applicability of the White Slave Act and the Lindbergh Kidnaping Act to a given state of facts in which the defendants, married in religious polygamy, freely crossed state lines with their wives and children as their respective vocations demanded.

Not one of the defendants is here charged with polygamy, nor is his defense in any degree based on either the propriety or desideratum of plural marriage.

The defendants do not assert that they may practice polygamy in violation of a state law, but they do insist that such marital status is neither the concern of the federal government in states, nor can it be made the *raison d'etre* of a White Slave Act prosecution.

We do have here, nevetheless, the question: Does a sincere religious practice of polygamy constitute a sale of unwilling female flesh, such as that contemplated by Congress when it enacted the White Slave Act, or is it a voluntary form of marriage solely within the jurisdiction of the States?

The petitioners earnestly contend that no power was ever delegated to the federal government:

(a) To declare upon the validity, or morals, or any form of religious marriage;

(b) To determine the verity of any religious tenet respecting any type of marriage;

(c) To ban, or punish, the practice of any pattern of religious marriage.

Such power never has been given to the federal government, either directly or by necessary implications; hence it dwells yet with the States and that ultimate repository of freedom—the people.

Given an inch of authority under the White Slave Act, ardent federal prosecutors strayed miles in the expression of their power, and it has taken lawyers a generation to herd them back to the original corral of Congress, which was "the sale of unwilling female flesh".

The delegation of the power to regulate interstate commerce was never intended to establish a police regulation over the marital affairs of the people. The Fathers wisely reserved that matter to the respective states; therefore, the violation of a State enactment against an act *malum prohibitum*, cannot furnish the essential guilty mind and intendment to the commission of a federal crime *malum in se*.

The courts have, in effect, held that the sale of involuntary female flesh, and the transportation of it across state lines for immoral purpose, is within the purview of the commerce clause; but they cannot so hold with respect to family life, children and marriage. Only the States can supervise that relationship.

Various marriages are illegal in different states—Negro with White; Oriental with White, and so on—; yet the federal government does not prosecute such people under the Mann Act when they travel from state to state; neither should it here, where the marriage involved is not *malum in se*, but merely *malum prohibitum*.

It is therefore to lasso too ardent public prosecutors and bring them, with all their selfish influence, to the original Congressional corral of the Mann Act—the sale of unwilling female flesh—that the decision of this lofty court is sought. Its reversal of these cases will not be in any sense a ratification of polygamy, but a determination to keep the White Slave Act within that horrifying stockade of involuntary prostitution originally intended. The federal courts must not be cluttered with the voluntary marital affairs of the people else we shall soon see the White Slave Act involved with the legalities and illegalities of divorce decrees.

Technically the jurisdiction of this Court is based on the following: On January 4, 1945, judgments in these cases were entered by the Circuit Court of Appeals (Tenth

Circuit), (R. 123-128). On January 30, 1945, petition for writs of certiorari was filed, and under the authority of Section 240(a) of the Judicial Code, as amended by Act of February 13, 1925, and Rules XI. and XIII. of the Criminal Appeals rules of this Court of May 7, 1934, the petition for Writs of certiorari was, on March 12, 1945, granted. The defendants entered pleas of "not guilty" to every charge.

## POINTS TO BE URGED

THE COURTS BELOW ERRED IN:

1. Refusing to sustain the Petitioners' challenge to the Grand Jury.

2. Finding that any of these cases comes within the legislative intendment of Congress in enacting the White Slave Act.

3. Finding that any of these cases comes within the legislative intendment of Congress in enacting the Lindbergh Act.

4. Holding that the true bills, or any one of them, informed the defendants of either: (a) the nature, or (b) the cause of the charges laid therein.

5. Failing to sustain the contention of Petitioners' Motion to Quash the true bills, under the issues here raised that:

   (a) The true bill stated facts insufficient to charge any crime;

   (b) The true bills contain nothing other than conclusions of law, not supported by any proper or required facts.

6. Finding by inference only that the doctrines announced by the Prophet Joseph Smith were false and immoral, and within the purview of the White Slave Act.

7. Entertaining and determining issues based on marriage and domestic relations.

8. Finding that the violation of a police statute of Utah carried with it the necessary criminal intent to debauch,

or prostitute.

9. Failing strictly to construe these criminal Acts, and to apply the rule of *ejusdem generis* thereto.

10. Finding that the motivating motive in transport across state lines by any defendant was an intended immorality.

11. Determining the status of Mormon "celestial plural marriage" as constituting any form of either prostitution or debauchery, within the meanings to be given those words in the Mann Act.

12. Finding any advantage, gain or profit, as contemplated by the Lindbergh Act, was here present in any of the charges here laid thereunder.

13. Determining the verity of religious dogmas here involved.

15. These prosecutions constitute cumulative penalties.

## SUMMARY OF MATERIAL FACTS

These cases were tried by the Court, sitting itself as a jury, upon stipulations of what the government's testimony would be. There were eight Mann Act and three Kidnaping Act cases; and the defense in all but one case (Cleveland R. 40) was that the women involved were all plural wives of the petitioners at the time of crossing state lines (one of them with eight children having been such since 1928), that in crossing state lines there was no purpose or intent to violate either of said Acts, and that, since the government has no control over marriage, neither the White Slave Act nor the Kidnaping Act had any application to the facts here. Pleas of "not guilty" were entered in all cases.

The District Court took all of the stipulations under advisement, and after rendering an opinion covering all of the cases as a group, found all of the defendants guilty.

The testimony is short and may be found at Record pages 7, 56, 72, 80, 97, 108, and 129. We deem it inadvisable to repeat it here; after our main brief herein we have,

however, discussed each case individually, preceding it with a summary of what we regard as the material facts. These summaries are found at pages 30 to 55 *infra*.

## HISTORY OF THE WHITE SLAVE ACT

Tersely expressed, the history of the White Slave Act is as follows:

(a) In 1910, the Immigration Commissioner reported that, under the promise of legitimate employment, European girls were being imported, and then, to their helpless dismay, sold to houses of prostitution in Chicago and New York, where stripped and beaten, they were held in horrible slavery, and the use of their unwilling bodies sold;

(b) Edwin W. Sims, U. S. District Attorney at Chicago, called the attention of Congressman Mann to the frightful situation;

(c) Mr. Mann introduced his bill, and the only opposition was from Southern congressmen who feared encroachment on State rights.

All this is set forth in Congressional Record (1910), Vol. 45 at pages 545, 546, 547, 548, 550, 805, 822, 1035 and 1037, and House Committee Report 47.

We have read every word of that debate, and never once was polygamy mentioned, despite the then recent Smoot investigation; indeed we feel that this Court has recently itself gone into the whole very thoroughly and must agree with that statement.

To hold polygamy, as practiced by these petitioners under the original doctrines of the Mormon Church, to be debauchery or prostitution, were to bastardize the rich blood of half of the people of Utah, including that of its most illustrious national citizens. Since Utah ranks first in per capita "Who's Who" of men of education and science, dare we stigmatize half of that laudable personnel with the epithets "sons of debauchery and prostitution"? The indignation of an appreciative nation—appreciative of art, music and science—would say "No!" Yet that is

the problem here—whether to make celestial marriage a species of prostitution and debauchery. Call it illegal—yes; but not prostitution.

If construction of the statutes were to ignore the rule of *ejusdem generis,* and hold "that other immoral purpose" means something besides "prostitution" and "debauchery", indeed anything forbidden by state statute, then we have this astonishing result:

Imagine a recreational park through which a state line runs. States X and Y forbid smoking by girls under 18. Jones, at a Fourth of July celebration, drives half a dozen girls under 18 over the line so that they may purchase a package of cigarettes at a stand which has them on hand. He is guilty under the Mann Act because states X and Y says he is contributing to the delinquency of minors—an immorality.

Another man takes his young friends over the line for wine, the imbibing of which, by minors, is forbidden in both states. He is guilty under the Mann Act.

In other words, common sense tells us that the White Slave Act intended to hit prostitution and debauchery only, and not to punish people's voluntary actions, even when such are prohibited by the states. To sustain these convictions merely on the ground that what the defendants did was regarded as "immoral", were to open the Mann Act wide, and make travel from state to state a perilous undertaking. Where in all these cases is there the slightest evidence of "slavery", indeed of anything but a happy, voluntary marital status with children?

To determine what is moral, and what immoral, is most difficult. Some will say that the answer is *autonomus* in the human mind, working (a) empirically as a result of its long experience, or (b) rationally more or less without the assistance of experience, or (c) intuitively in accordance with conscience. Others will maintain that the answer is *heteronomous;* that is, based on some authority *outside* of the mind. These would insist that what is moral must be determined by (a) social sanction in accordance with custom and tradition or (b) political sanction, as set forth

by the state in its laws, or (c) religious sanction as commanded by the law of God.

These petitioners believe that any citizen is justified in determining what is moral by using any of those six criteria, and that no court may hold that the criterion chosen is the exclusive and correct one. Indeed, petitioners claim that their practice of plural morriage not only complies with their experience, their conscience and their reason, but also it is commanded by their God, and only state courts may say "no". A federal court has no statutory enactment concerning what is moral nor can it fix it upon such a varying thing as custom. It knows that conscience is largely a matter of environment, and intuitive promptings, mostly a question of geography.

It is not too much to say that the criterion ethical, the public or private moral, has confounded philosophers since earliest times; indeed such modern writers as Prof. G. E. Moore (*Principia Ethica*) and William David Ross (*Nicomachean Ethics*) have given up defining the ethical test and denied the existence of any single moral criterion. They have had the benefit of ethical writings from Aristotle to the present time; and have still found themselves unable to give a definition. One now a professor at Cambridge, the other until his death, an editor at Oxford, they are not little men. On the one side we have axiological theories determining what is right by the value of the action; on the other, deontological theories, basing it on intuition. We drift from Price, Reid, Clarke, Sidgwick and Ross to Cumberland, Butler, Whewell and Martineau, and still do not know what is morality, and much less public morality. When we stood and watched the smoke uprise from the cremation of the body of Herbert Spencer in London, we thought he had found an answer in his "Ethics"; yet now we know even he had no definition of morals. It is a difficult road; yet the lower Court solved all its problems with a word. It is not surprising then that philosophers have finally coined the words, "autonomy of ethics" based on the theory that ethics is not a part of, and cannot be derived from, either metaphysics or any of the social or natural sciences.

If, therefore, the word "immoral" in the Act does not refer to "prostitution" or "debauchery", this Court is driven to the necessity of defining "immoral"—a task which has caused the brow of man to sweat since the dawn of history, without definite results.

This Court may frown upon the practice of polygamy as contrary to the accepted habits of modern America; yet it has but one duty—to determine whether the Mann Act had such marital status and association in view. The very thought of prostitution is contrary to the words: "man", "beloved wives" and "beloved children"; and a recourse to biology lends little comfort to the frown. Until the laws of the states change, there can be no legal practice of celestial marriage, but in the meantime, to place it in the category of prostitution is to belie its history.

The sole place which any reference to plural marriage can properly have in these matters, is to prove, if such be allowable, an immorality of the kind banned by the federal statutes involved. Certainly the Lindbergh Act has no place upon this subject.

Each of the federal statutes herein, being penal and unknown to the common law, requires a strict construction. If a liberal construction be permitted, and the Courts be allowed to superimpose their own ideas upon the legislative intent;—if the rule of *ejusdem generis* be not strictly applied here—, they will have given sanction to a form of statutory construction to all intents and purposes declaring it fit and lawful for courts to legislate directly, by private judicial interpretation,—a doctrine abhorrent to all American jurisprudence—; and at the same time will have created a form of procedure under which all religious freedoms, all protection of the same by the Constitution will by private construction, interpretations and expansions, be rendered sterile and ineffective; and eventually, by this same means, they will have made possible a State religion by judicial declaration that all other forms than it are immoral!

If the judgments below be here affirmed where will this form of law end? Who can depend upon the Constitu-

tional protections of religious thought? When will others than these religiously ardent people, those who represent great bodies of citizens not of an orthodox faith, be subjected to a subsequent and worse form of statutory construction? How long will freedom of religious thought remain? How long can civil government remain, in Utah, or elsewhere, free from absolute domination by ecclesiastical authority?

These are questions of broad import. They are here presented for the first time in this concrete form. They require a clear declaration that such was not within the legislative intent of the Congress in its enactments of either of the statutes here involved; was not intended to fall within the direct, or the incidental, powers conferred on the federal government to "regulate" commerce. Affirming this decision, will be to declare power in the federal government, by clear and unequivocal police statutes, not finding their basis in such delegated powers, to regulate not only these people in their religious beliefs and practices, but also all citizens with dissident ideas on questions of religious morality crossing state lines.

Regulation of the religious marital actions of citizens, by the federal government has no place in the history of our people; it rests exclusively within the functions and prerogatives of the sovereign states.

The affirming decision in the Camannetti case came as a distinct shock to many lawyers. The legislative intent there made out required a stretching of that intent to almost the breaking point. And, in that case, there appeared no religious question—no doctrine sincerely believed by the defendant to have been the actual and binding command of the Almighty.

The cases now at bar are far removed, in principle and in fact, from that case. We affirm that that case is not in point at all on the question of the required guilty mind here necessary to be specifically shown, else we have a federal statute declared to be a proper and Constitutional police regulation, not requiring any support in the great power to regulate "commerce" (for it is only in the mat-

ter of crimes made so by a police statute that the mere knowledge of the ban and a knowing violation of the ban, can supply the necessary *mens rea.*) Also, we shall have a violation of a police regulation as to the speed of automobiles on the highway showing an intent to do an immoral act.

Of course, no one can seriously contend that the mere violation of any police statute forbidding the doing of an act merely *malum prohibitum* can carry with it the necessary criminay intent essential to the conviction of a crime *malum in se.*

The criminal intent to do an immoral act—to "prostitute" or "debauch" in the cases here—must be made to appear, as well as the physical act so banned. Only the latter appears.

Examination of the religious beliefs of these defendants in the divinity of the command of God as given through Joseph, the Mormon Prophet, being connected with the showing of their acts here, can lead to but a single conclusion:—

No one of them intended to offer any of these women to commercial sexual indulgence; no one of them intended any man so much as to suggest an approach to any one of these women; all believed that the practice of the forms of vice banned by the White Slave Act was, and is, most reprehensible; no sexual relationship was indulged by any defendant until after an established "celestial" marriage, and the exclusive possession of the woman by the man entering into that relationship, completely believed by both the man and the woman to be actually "the law of God".

No definition, which we have been able to discover, so much as intimates that such acts, under such beliefs, can possibly make out any "prostitution", or any "debauchery", of a woman so "married".

A new definition of each of those terms must be coined in order to affirm these convictions.

A new definition of the required "criminal intent" must

be declared in order to find any such here present in the minds of these defendants.

As well say that the Roman Catholics were "immoral" in their determination to continue to import sacramental wine, despite the Volstead Act, as to declare here these defendants to have had a conscious mental determination, or intent, to "prostitute" or "debauch" these loved "wives".

As well determine the same great Church to be immoral in its declared doctrine that its members must obey the law of God when the same falls under the inhibition of the civil law, as to find here these petitioners immoral in their same sincere religious principles; and then, without more, declare them to have had the requisite "guilty mind", and the specific criminal intent, to violate the ban of either the Mann Act or the Lindbergh Act. To hold so must be to institute a new jurisprudence in these United States.

That the beliefs of these defendants appear "ugly" to many, cannot supply the essential *mens rea*. That is a mere difference in present view. (See: the "American Magazine", March, 1945.) Many of those who would so regard these acts as "ugly", are descended from proud American mothers and grandmothers of the like ages at marriage.

A clear summation of all of the White Slave Act cases shows that an illegal sexual indulgence, incidentally continued in the crossing of state lines for some other distinct and primary reason, cannot be held a violation of that Act. A "prostitution", or a "debauchery", in the commonly accepted meanings of those words, must appear as the actuating motive, and the usual meaning of those terms must be shown to have been accomplished under that impelling motive. A mere continuance of an existing voluntary illegal sexual status between the same man and the same woman, and an incidental crossing of the state lines, cannot constitute a violation of the Act. Here, in every case save one, the status of "celestial" marriage was of long and exclusive duration between these men and their transported "wife", prior to the transportation.

In the one case (No. 896): If prostitution or debauchery had been the actuating motive of Cleveland, why did they await the performance of a "celestial marriage" before sexual relations were indulged? Surely, had either Cleveland or the woman been inclined to either "banned form of life", no waiting period would have been tolerated by either. Common sense, and our experience in life, give that as the unquestionable fact.

Now, let us see just what these men and women, their "celestial wives", did believe, and what actually was their intent in entering into the forbidden "marriage":—*

> "They accuse me of polygamy, of being a false prophet, and many other things which I do not now remember; but I am no false prophet; I am no imposter; I have had no dark revelations; I have had no revelation from the Devil; I made no revelations; I have got nothing up of myself.
>
> "The same God that has thus far dictated to me and strengthened me in this work, gave me this revelation and commandment on celestial and plural marriage and the same God commanded me to obey it."
>
> Joseph Smith, the Prophet, in the Contributor, Vol. 5, p. 259.

Continuing, in the same declaration, supra, the Prophet said:—

> "If I do not practice it I shall be damned with my people. If I do teach it, and practice it, and urge it, they say they will kill me and I know they will. But we have got to observe it. It is an eternal principle and was given by way of commandment and not by way of instruction."

The "Contributor" was an official publication of the Mormon Church.

The "Doctrine and Covenants" of the "Mormon" Church is before the Court. (By judicial notice. See:

*We have placed as an Appendix hereto a summary of the religious history of the defendants.

Hilton v. Roylance, 25 Utah 129, 69 Pac. 660.) Its Section 132 is the part that contains the "revelation" of the Prophet Joseph Smith, to which he refers in the above statement. By its terms, it commands obedience to its precepts, and makes plural marriage essential to exaltation in the celestial kingdom of God.

The "Key to Theology", a Mormon publication written by their beloved Apostle Parley P. Pratt, whom that people have regarded as an Apostle Paul, says:

> "The principal object contemplated by this law is the multiplication of children of good and worthy fathers, who will teach them truth, and train them in the holy principles of salvation." (pp. 171-172)
>
> "A daughter of Israel, who, by *prostitution*, was rendered unworthy or unqualified for the duties of a virtuous wife and mother, was considered unfit to live; while the male who would thus trifle with the fountain of life and contribute to render a female unworthy to answer the end of her creation, was also condenmed to death." (p. 172)
>
> "If we except murder, *there is scarcely a more damning sin on earth than the prostitution of the female virtue or chastity at the shrine of pleasure or brutal lust.* * * *" (p. 174)

One of the present-day pre-eminent leaders of the Mormon Church, the Honorable J. Reuben Clark, Jr., a former Under-secretary of State of the United States, and ex-Ambassador to Mexico, under date of April 15th, 1944, said:

> "We of the Latter-day Saints have everything, or we have nothing. There is no middle ground. We know that Joseph Smith was the Prophet of God. We know that the Father and the Son came to him * * *".
>
> "Deseret News" (the Church newspaper)
> Church Edition, p. 13
> (Issue of April 15, 1944.)

An authoritative Mormon Church work is the "Compendium". Its statements have had acceptance among that

people for near a hundred years. From it, we quote:

> "We cannot presume that the Lord ever gave women to these men under any title, except for the noble purpose of parentage. *Concubinage is unknown among the Latter-day Saints.* Wifehood, in the fullest sense of the word, is conferred by the marriage covenant. All a man's children are his legitimate heirs both by law and custom."
>
> "Compendium", p. 137.

A great Englishman, commenting upon this phase of "Mormonism", has said:—

> "* * * I do not know any more moving passage in literature than that in which Brigham Young described how, after the appalling order, he met a funeral on his way home and found himself committing the mortal sin of envying the dead. And yet Brigham Young lived to have a very large number of wives according to our ideas, * * * and to become immortal in history as an American Moses by leading his people through the wilderness into an un-promised land where they founded a great city on polygamy.
>
> "Now *nothing can be more idle, nothing more frivolous, than to imagine that this polygamy had anything to do with personal licentiousness.* If Joseph Smith had proposed to the Latter-day Saints that they should live licentious lives, they would have rushed on him and probably anticipated the pious neighbors who presently shot him."
>
> George Bernard Shaw, as quoted in "The Millennial Star" (a Church, Mormon, official publication of England, issue of August, 1944, p. 817)

That the orthodox members of the "Mormon" Church have seen fit no longer to countenance the practice of polygamy, cannot remove the same from its claimed divinity. It is either true, or it is false. If false, it may be immoral. If it is, as it was held to be when announced by the Prophet Joseph Smith, truly the very command of God,

who will say it is immoral unless the Court follows some other moral sanction than the law of God. This Court has neither precedent nor statute upon which it can rely to determine what is moral, or what is the word of God. Who dare say it is the very prostitution and debauchery, the very concubinage, if you will of the Mann Act enactment against the sale of unwilling female flesh?

Having, as is claimed, had a divine origin; being the very word of the Almighty, there exists no court in this Nation which has any authority to gainsay that claim, or to declare the doctrine false, unless the Court be prompted by patterns unknown to the law. It may be forbidden by the States, but who dare call it immoral?

The adjudication of the falsity of the doctrine being first necessary to judicial condemnation of it as immoral, its morality is beyond the powers of any court in the United States to declare upon. It is a religious dogma, and so above any questioning as to its verity by the courts. For all purposes here, the verity of the doctrine must be unquestioned unless the Court adopt a new criterion of morality and abandon the law of God as the highest expression of its true meaning.

Its morality cannot be challenged; FOR GOD'S COMMAND CANNOT BE IMMORAL OR REQUIRE IMMORALITY. And, such being the case, what was the frame of mind present in these victims of a law contrary to a religious tenet which, from birth, they were taught to believe? Here is squarely presented the very complex question as to when man-made law may invade a religious right, or rite.

In all our endeavors, and in every court, and in the administration of every law, we are sworn under the blessings of our God, whatever that God may be, in the performance of governmental duty; every judge, every juryman, every witness invokes the aid of his own God. Why? We do not know unless it is the intent to recognize a Christian God,—*the* Christian God of the subscriber.

The only ground upon which a full denial of these rights can be predicated has been the theory that the state,

local jurisdiction, may define the margin; in other words, the prohibitory law under its police powers; the right of the state as distinguished from the sovereign powers granted to the federal government.

It is conceded by everyone that each one of the petitioners sincerely believed this doctrine above announced, that each was acting under such sincere belief. It is an impossibility for a single mind to have such belief, and at the same time, entertain any such criminal intent as is here required to give application to these statutes.

These convictions must be reversed for the following reasons:

(a) Not to reverse, requires an adjudication of the truth or falsity of the "revelations" of the Prophet Joseph Smith, and a consequent judicial determination that the "Mormon" Church, with its nearly one million members, in the words of the Honorable J. Reuben Clark, Jr., "has nothing",—is a victim of a great hoax.

(b) Not to reverse requires a new jurisprudence in these United States, destroying the long-established requirement of showing the necessary "guilty mind", and "criminal intent", and to abandon thereby those former prerequisites for conviction of any crime *malum in se*.

The White Slave Act covers only acts *malum in se*. The mere violation of a State prohibitory Act cannot supply the intent—the essential *mens rea*, to a conviction under it. It is a fundamental precept that a guilty mind cannot be inferred. The *gravamina* of the offense here charged are "prostitution" and "debauchery"—matters *malum in se*; and intent to commit polygamy, an offense merely *malum prohibitum*, cannot furnish the essential *mens rea* in these cases.*

There lies one of the master questions squarely presented and for the first time. All former declarations upon the vice or virtue of polygamy have not been necessary

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(*See Lawson on Presumptive Evidence, pp. 271-272 16 Corpus Juris, p. 74, Sec. 41 16 C. J. pp. 8-81, Sec. 47 Commonwealth v. Adams, 114 Mass. 323 19 Am. R. 362)

to any determination of those cases in which such appear, and, as agreed by the Hon. T. Blake Kennedy in his memorandum decision, they constitute but *obiter dicta*. (R. p. 13).

Now we ask: Can the Federal Courts so declare at all, and still remain within their powers?

We answer: such cannot be done under our Federal Constitution for the reason that any such declaration would invade the sole prerogative of the sovereign states, whose exclusive function it is to regulate family matters—marriage and divorce—within their respective borders. Hence we have had recent agitation for a constitutional amendment permitting a federal law, making uniform the law of divorce in the United States. Had the Congress such power, there would be no need for that agitation.

Within the past few months this Court has spoken on this subject as follows:

> "The domestic relations of husband and wife * * * were matters reserved to the States. State of Ohio ex. rel. Popovici v. Ogler, 280 U. S. 379, 383, 384, 50 S. Ct. 154, 155, 74 L. Ed. 489, and do not belong to the United States. In re Burns, 136 U. S. 586, 593, 594, 10 S. Ct. 850, 852, 853, 34 L. Ed. 500."
>
> Williams v. State of No. Carolina, 65 S. Ct. 1092, 1096 (Decided May 21, 1945).

If, therefore, the Federal government has nothing to do with the domestic relations of its citizens, does it have power over them if the relations are illegal? If the relations are admittedly illegal is it still solely within the province of the states to handle all matters pertaining to them? The answer involves a definition of the word "domestic."

Ballentine's Law Dictionary says:

> "The word has been variously defined by lexicographers, 'but with substantial uniformity of meaning. Johnson's Dictionary defines it as 'inhabiting the house, not wild.' The Standard Dictionary defines it as 'belonging to the house or household; domesticat-

> ed; tame.' Webster's New International, 'living in or near the habitation of man; domesticated; tame as distinguished from wild; living by habit or special training in association with man.' Century Dictionary, 'relating to or belonging to the home, or household, or household affairs.'"

No one could claim that the defendants in the case at bar with their homes, wives and children, were not living in a domestic relationship as defined above, even though that relationship under the laws of Utah was illegal. The illegality in no way removes its character of domesticity; and if such be the case their actions in that relationship are no affair of the United States government. It is for Utah to define and punish. The cold logic of a contrary position is for this lofty Court to say: We reverse our opinion that the Federal government has no power over the domestic affairs of its citizens and we now assert that the Federal government has jurisdiction over the domestic relations of its citizens when such relations are illegal. But the Constitution never authorized such a distinction: if the affairs are domestic whatever their legality the Federal government has no concern with them.

*Any other answer to our question must be an affirmation of the federal power to legislate judicially on the subject of marriage.* This would be an unwarranted expansion of the explicit terms and the legislative intent of the Mann Act, of which it is said:

> "We do not here question or reconsider any previous construction placed on the Act which may have let the federal government into areas of regulations not originally contemplated by Congress. But experience with the administration of the law admonishes us against adding another chapter of statutory construction and application which would have similar effect and which would make possible even further justification of the fear expressed at the time of the adoption of the legislation that its broad provisions are 'liable to furnish boundless opportunity to hold up and blackmail and make unnecessary trouble, without any corresponding benefit to society.'"

The Act, and its purposes, are further delimited in the Mortensen case (Mortensen v. U. S., 322 U. S. 369), in the following language:

> "The statute thus aims to penalize only those who use interstate commerce with a view toward accomplishing an unlawful purpose."
>
> "People not of good moral character, like others, travel from place to place and change their residence. But to say that because they indulge in illegal or immoral acts, they travel for that purpose, is to emphasize that which is incidental and ignore what is of primary significance."
>
> "Whatever their faults, petitioners are entitled to have just and fair treatment under the law and not be punished for transporting girls in interstate commerce for a purpose wholly different from any of the purposes condemned by Congress."

The Supreme Court has also said concerning what may not be imputed from any legislation:

> "But beyond all these matters no purpose of action against religion can be imputed to any legislation, State or Nation, because this is a religious people. This is historically true. From the discovery of this continent to the present hour there is a single voice making this affirmation."
>
> Church of the Holy Trinity v. United States
> 143 U. S. 457-472 12 Supt. Ct. Rep. 511.

In the face of the foregoing quotations, we ask: How can it be asserted by any court that the Mann Act was designed to serve as a means of suppressing the practice of religious plural marriage?

Nor must we lose sight of the fact that the transportations here, save one only, were but an incident to a continuance of existing relations—but an incident to an established marital status. No conclusion can be drawn that such sort of doings ever occurred to the minds of the Congress which enacted the "White Slave" Act.

If a sovereign state should legalize the practice of plural marriage, could the Federal Courts prevent it? Such question is answered by the Enabling Act of Utah requiring the new state to prohibit polygamy. (Utah Code 1943).

It is clear that Congress never intended that such marriages should be classed as either a form of "prostitution", or held to be a "debauchery". Such matters are

> "Wholly different from any of the purposes condemned by Congress."

All doubt about this last proposition is removed by the declaration of the Supreme Court when it says:

> "Congress was attempting primarily to eliminate the 'white slave' business which uses interstate and foreign commerce as a means of procuring and distributing its victims, and 'to prevent panderers and procurers from compelling thousands of women and girls *against their wills and desires to enter and continue in a life of prostitution.*' Such clearly was not the situation revealed by the facts in this case." (Italics inserted)
>
> (and the Court quotes in part from, and refers to: H. Rep. No. 47 p. 10 (61st Cong., 2d Sess.); and to the same statements contained in S. Rep. No. 886, p. 10, 61st Cong. 2d Sess.) and also to 45 Cong. Rec. 805, 821, 1035, 1037.)
>
> Mortensen v. United States, supra.

To illustrate how some of the courts have been gradually restoring the original purpose of the Mann Act, and how their efforts have at last culminated and achieved vindication in the Mortensen case, we cite the following:

In Gerbine v. United States, 293 F. 754 (CCA 3rd), it was held that the transportation by a married man of a girl from New Jersey to Pennsylvania, for the purpose of contracting a bigamous marriage, was not within the statute. This case is well reasoned, and is in point as upholding the contention of the defendants here.

In Fisher v. United States, 266 F. 667 (CCA 4th), defendant, who was already having illicit relations with a girl in one state, took her into another state for a visit, and brought her back the same day and resumed relations. (Identified with the facts here in case No. 895.) This was held not within the Act—the transportation being merely incidental to the illicit relations.

In Van Pelt v. United States, 240 F. 346 (CCA 4th), it was held that the transportation must contemplate a change of relations, and a change for the worse in the situation of the woman. In other words, to accomplish a purpose not already an accomplished fact.

In Sloan v. United States, 287 F. 91 (CCA 8th), defendant had been having illicit relations with a woman in Illinois. He took her to St. Louis, Missouri, to see her sister. Thereupon he had illicit relations with her in Missouri. The Court said that with the act in St. Louis, the United States was not concerned, and that "there is nothing in the evidence to show any possible reason why he should have gone to the trouble and expense of taking her to St. Louis merely in order to have intercourse with her when he could have done so at home."

To the same effect is United States v. Grace, 73 Fed. 2d 294.

In Yoder v. United States, 80 F. 2d 665 (CCA 10th), the defendant was having illicit relations with the woman, Mrs. Young, in Oklahoma. They went together to Chicago. Mrs. Young testified that the purpose of the trip was to get divorces, and she employed the defendant to go and inspect a garage she thought of buying. The court held that the use of the word "intent" was surplusage, and that the word in meaning is different from "purpose", and that the court erred in charging the jury that "intent" is equivalent to "purpose". The government offered evidence of the immoral purpose—defendant offering evidence that the purpose was legitimate, a business proposition. The court held that, if the purpose of the trip was legitimate, the intent of the defendant to continue in Chicago his relations with Mrs. Young would not warrant a

conviction, and that, if the sole purpose of the trip was proper, the intention to have illicit relations was merely incidental, and did not make out the crime; and cited several cases to which we have referred.

In Drosser v. United States, 16 F. 2d 833 (CCA 10th), defendant took a married woman from Salt Lake City to Anaconda, Montana. It was held that, if the purpose was to marry her there if he could, and he had no intention to have illicit relations with her, he was not guilty, and the conviction was reversed.

In Alpert v. U. S. (CCA, N. Y., 1926), 12 F. (2d) 352, it was held that a journey from one state to another, if followed by illicit intercourse, does not result in violation of the White Slave Traffic Act where the journey was made for wholly different reasons.

(In the cases at bar, the men were earning a livelihood, and the acts complained of were but the incidental continuation of a status already existing.)

In U. S. ex rel Sirchie v. Smith (D. C. Pa. 1943), 52 F. Supp. 610, where it appeared that the defendant and the woman motored from Washington, D. C., to Philadelphia, and then back to Washington, contracting a bigamous marriage in Pennsylvania, and, thereafter, cohabiting at Washington as man and wife, removal was denied on the ground that no offense was committed by the transportation charged.

## EJUSDEM GENERIS

If it be the argument of the government, that we are here concerned only with the overt acts of state-line crossings followed by illegal sexual intercourse, and the religious beliefs of the defendants were irrelevant, then why did Congress put the word "purpose" in the Act and how can purpose be determined without ascertaining the minds of the defendants as clearly shown by their words and actions accompanying the crossings? To illustrate: It is erroneously reported that Richard Roe's wife, an army nurse, is killed in France. He remarries within a month, crosses a state line with his new wife and there has sexual intercourse with her. Next day a cable from his legal wife proves her to be alive. His second marriage

is void, and he has committed the overt act of the Mann Act. Does any Court say that his belief, his intent could not be shown? Reverse the facts: John Doe takes his legal wife across a state line to put her in a house of prostitution, and is justly convicted of the Mann Act. Does anyone contend that he could be convicted without showing what was on his mind when he made the trip? Any way one looks at it purpose always involves an investigation of the mind as shown by things disconnected with the actual crossing. The belief of these defendants as indicated by many many things absolutely prove that neither prostitution nor debauchery was on their minds. To confine the proof in Mann Act cases to actual overt acts were to deny the criminal law of intent. Suppose the government replies and says: "Yes, but the trouble is, these people believed in something illegal." Our retort is: "Illegal where? Certainly not under any applicable United States law. The practice of the belief is illegal only in the States where alone it can be prosecuted." The practice is not something *malum in se* like murder but merely something not permitted under state law. No one contends that it is lawful in the states. Congress used the word "purpose" and it meant "purpose", and as Barnabas said when he came to Antioch the important thing was "purpose of the heart" (Acts 11:23) or as Paul put it, "the thoughts and intents of the heart" (Hebrews 4:12).

Robert Jones may physically drive his neighbor's car across a state line, but would anyone contend that he is guilty of the Dyer Act unless it be shown that he had the purpose to steal it?

Now suppose the government in view of these illustrations retreats from its position, that overt acts are alone sufficient without proof of the mental purpose of the defendants. Suppose it concede also as it must from the facts, that there was no proof of intent to commit either debauchery or prostitution, for children and a marital relationship are inconsistent with those terms. We then have the government on the very thin limb of "other immoral purpose". Suppose it be argued that Congress could not possibly have meant those words to include everything illegal or immoral by state statute, such as smok-

ing cigarettes by minors, as that leads to ridiculous conclusions, and suppose further the government contends that the word immoral refers alone to sex. All right; even then, the rule of *ejusdem generis* compels us to hold that the word "immoral" refers to "debauchery", "prostitution" or sexual crimes of the same genus. What are they—surely not voluntary, natural motherhood. They are that host of sexual perversions and unnatural practices that in many instances are so revolting that the great authority Krafft-Ebing in his "Psychopathia Sexualis" gives details of some of them only in Latin. It is such things that Congress had in mind and there is none of it here. This is not clearer than if Congress had inserted the word "similar", and said "debauchery and prostitution and other similar immoral purpose". Associated in the mind of Congress with all these painful and disgusting things were the words "commerce", "sale", "profit" and "slavery". Only the bitterness and the vengeance of sect on sect could ever have given birth to the tragic thought to apply it to these lowly people with their humble homes and healthy children. Certainly no legal reasoning could have prompted it, and even the District Court before passing sentence said in his written opinion: "This in a way forces the court to the unenviable situation of setting in judgment between factions in a church fight." (R. 23). To these defendants prostitution, debauchery, and unnatural sexual practices, constitute the unpardonable sin that would haunt them throughout eternity. We are not here upholding a plurality of wives, even though Prof. C. E. M. Joad of the University of London has within the past few weeks advocated its practice for England (See Associated Press, Salt Lake Tribune, Feb. 25, 1945, D. 7); but we are asserting that a plurality of wives with children in the homes is not that chamber of involuntary horrors that aroused the nation to enact the white slave law. To say so is to belie Utah's history for the past hundred years.

Certainly therefore if the government is forced out upon the thin limb of "other immoral purpose" that limb must give way with the weight of mis-applied law; but as the prosecution falls indignation compels one to enquire who instigated such a monstrosity against these humble peo-

ple? Who first said their lives were comparable with the dens of iniquity? While the intents of the defendants are open the motives of the prosecution have not been quite so clear.*

## CUMULATIVE PENALTIES

This Court has frowned upon the imposition of cumulative penalties above and beyond those specified by state law for infractions of a state's criminal code by its own citizens. (U. S. v. Constantine, Ala. 1935, 56 S. Ct. 223, 296 U. S. 287, 80 L. Ed. 233, followed in U. S. v. Kesterson, 1935, 56 S. Ct. 229, 296 U. S. 299, 80 L. Ed. 241).

In the cases at bar nothing new occurred as a result of crossing state lines—there was but a continuation of a marital status sufficiently punishable under Utah State Law. (Polygamy, Utah Code, 1943, 103-51-2 maximum 5 years) (Mann Act—maximum $5000 and 5 years). So if these cases be affirmed we have the federal government imposing a sentence of three years imprisonment on top of a state sentence of five years for the identical offense. That this reasoning is sound as shown by the following quotation from the majority opinion in the Constantine case *supra*:

> "We conclude that the indicia which the section exhibits of an *intent to prohibit and to punish violations of state law as such are too strong to be disregarded, remove all semblance of a revenue act* and stamps the sum it exacts as a penalty. *In this view the statute is a clear invasion of the police power,* inherent in the states, reserved from the grant of powers to the federal government by the Constitution.

*If it be said that petitioners have here referred to books and works not included in the stipulations, it should be remembered that forty-four cases in this matter broke out in this crusade on March 7, 1944, and the ones herein considered came to trial within a few days. The stipulations were drawn in a few hours, and necessarily are not so full and favorable to the defendants as they might have been. The government as the result of months of preparation was able to stress points creative merely of bias and prejudice—the marriage to a baby incident, etc.—; but when the cases were submitted the defendants did submit to the District Court on brief all of the quotations from books herein referred to. The Utah Courts take judicial knowledge of those books; hence we have no hesitancy in adverting to them here.

(7) *We think the suggestion has never been made*—certainly never entertained by this court—*that the United States may impose cumulative penalties above and beyond those specified by state law, for infraction of the state's criminal code by its own citizens.* The affirmation of such a preposition would obliterate the distinction between the delegated powers of the government and those reserved to the states and to their citizens. The implications from a decision sustaining such an imposition would be startling. *The concession of such a power would open the door to unlimited regulation of matters of state concern by federal authority. The regulation of the conduct of its own citizens belongs to the state, not to the United States. The rights to impose sanctions for violations of the state's law inheres in the body of its citizens speaking through their representatives.* * * *"

When it is considered that it is the sole prerogative of the state, not the United States, to place stamp of approval or the contrary upon a form or type of marriage; that neither sovereign has the right to declare upon the verity of a religious dogma or tenet; that these people are being here prosecuted upon a charge of pretended immorality, the determination of which is not possible until the truth or falsity of the "revelation" of God under which they so do shall have been decreed, the force of the above statement of this Great Court is made most apparent, and its application to the cases at bar is shown to be complete.

We are therefore compelled to the conclusion, that the federal courts have no jurisdiction over these White Slave Act cases and this for the reason that the acts complained of are adequately punishable under Utah state law. The Court need go no further in disposing of them, for it should be a matter of policy as well as right that the federal courts may not be used to do double vengeance upon citizens sufficiently amenable to the police powers of their own states. The federal courts have no jurisdiction over these double penalty cases.

The following defendants here are now in the State Prison at Salt Lake City, Utah, serving sentences of five years each for the very acts embraced herein: Heber Kim-

ball Cleveland, David Brigham Darger, and Charles F. Zitting.

## THE GRAND JURY CHALLENGE DENIED

Appellants' second Error to be urged, set out at p. 16 of their Application, etc., reads as follows:—

> "The Court erred in affirming the Court's failure and refusal to find that the Grand Jury, finding the True Bill in said cause, was prejudiced and biased against this defendant."

The defendants, severally and together, in each of these matters, duly filed and presented their challenge to the Grand Jury (R. p. 71 et seq.) to which reference is made for full contents.

There it is averred, (and no contradicting affidavit appears), that the Grand Juror Clyde (its foreman) was a high prelate of the dominant "Mormon" Church; that he, together with all of the like officers holding positions in that Church, were under the direct order of the First Presidency of said Church to seek out, and bring to trial, all persons not subscribing to the rule of the Church under the Manifesto of 1890, by which it is claimed its continuance of polygamy was abandoned—specially directing such activities against these appellants.

During the argument on this challenge, Mr. Boyden, the United States prosecutor who conducted all of these matters in the courts below, stated in open court that fully half of the grand jurors, so returning that series of true bills, was of the same faith and position.

We shall not expound at any length upon the force of a priestly edict issued to a priest of a lower order in that Church. Such is regarded by all the lower priests as being the very direction of the Almighty. They act without further order, and assiduously.

Mr. Boyden has further stated into the record that he had the assistance of that dominant Church in Utah in his prosecution of these appellants.

This situation is not new in the history of Utah, although it does appear in the reverse as recorded. Being true in the reverse, it is likewise true when turned about. Upon this, this court has said that it clearly constitutes a bias and a prejudice in a petit juror, and constitutes good cause for challenge to be sustained. See:—

United States v. Miles, 103 U. S. 304, 26 S. Ct. Rep 482* (a)

Reynolds v. United States 96 U. S. 246 (b)

These petitioners never had a chance of any impartial consideration of these matters by the grand jury. At least half of the grand jury entered the box with a prior, fixed, order to return a true bill against them, the preface of which Church mandate reads:

"—*we are willing, and anxious, too,* that such offenders against the law of the state should be dealt with and punished as the law provides. *We have been, and are willing to give such legal assistance as we legitimately can in the criminal prosecution of such cases.* * * * *it is our duty,* as citizens of the country, *to assist in the enforcement* of the law, and the *suppression of pretended 'plural marriages',* * * * *we wish to do everything humanly possible* to make our attitude so clear, definite and unequivocal as to leave no possible doubt of it in the mind of any person." (Italics in-

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* (a) "It is evident from the examination of the jurors on their voir dire, that they believed that polygamy was ordained by God, and that the practice of polygamy was obedience to the will of God. At common law, **this would have been ground for principal challenge of jurors of the same faith.'** See 3 Bl., 303. **It needs no argument to show** that a jury composed of men entertaining such a belief could not have been free from bias or prejudice, on the trial for bigamy, of a person who entertained the same belief and whose offense consisted in the act of living in polygamy.—Whether or not that bias was founded on the religious belief of the juror is immaterial, if the bias existed."

U. S. v. Miles, supra.

(b) " * * * **From the testimony it is apparent that all the jurors to whom the challenge related** were, or had been, living in polygamy. It needs no argument to show that such a juror could not have gone into the jury box free from bias and prejudice, and **if the challenge were not good for principal cause, it was for favor.**"

Reynolds v. United States, supra.

serted)

Under the complete dominance of that order how could a grand juror, be he ever so well intended, act with fairness or impartiality where the charge involved the mentioned "pretended" plural marriages? The very adjective "pretended" is of great significance, without more.

We have contended from the beginning, and we now contend most earestly that: These defendants and petitioners have never had a fair chance for an impartial consideration of their matters by the grand jury that returned these true bills; that the whole grand jury proceeding was, and is, void and against the Constitutional guarantees.

In connection with the petitioners' motions to quash these true bills (R. p. 69), this challenge to the grand jury requires a finding now that the whole proceedings below were unlawful and void.

## SHORT SEPARATE DISCUSSION OF THE SEVERAL CASES

The Cleveland cases: Nos. 23, 24 and 25 of this appeal.

*Case No.* 23 (2945 of Record Index) (R. pp. 1-40) charges this defendant with a single unlawful interstate transportation of Kathryn Lucy Collingwood, from Salt Lake City, Utah, to Evanston, Wyoming,

> "for the purpose of debauchery and for the further immoral purpose, to wit, for the purpose of having sexual intercourse with the aforesaid woman,—and for the further immoral purpose, that the aforesaid woman should be and act as his mistress and concubine"; etc. (R. 1).

The stipulated testimony, as to this woman, relates two other separate travelings interstate of these people, but no charge has been laid for those separate doings. We are therefore properly to consider the charged transportation and the testimony relating to that incident alone in reaching any conclusion in this case. With that in mind, we make the following

## SUMMATION OF THE TESTIMONY

The stipulation, (R. 7) shows as to this as follows:

This woman was an adult, trained and practicing professional nurse, employed at a general hospital in Salt Lake City, Utah, when she met this defendant. Coming to believe the doctrine of "celestial" marriage, as originated by the "Mormon" Church, she "married" the defendant under its ceremony and ritual at Salt Lake City, Utah, on the 16*th day of August*, 1941. They immediately engaged in the usual married relations, in Utah, including sexual intercourse, and continued to do so until the 1*st day of November*, 1941, a period of some two and one-half months, when they went together to Evanston, in the State of Wyoming, hired a hotel room, spent the night together, and returned to Salt Lake City, Utah, the next day. While in Wyoming they engaged in their former practice and custom and had sexual relations with each other. They continued so to do in Utah, after their return from Wyoming. The defendant, in so taking this woman to Wyoming, was keeping a prior promise made to her to take her on a "honeymoon", and he supplied the necessary transportation for this trip interstate. We set out in the accompanying footnote the ritual of their "marriage".* (See bottom page 32).

While other statements are set out in the stipulation, we say that the foregoing summary shows the whole of the same properly to be considered in this case.

## ARGUMENT

*Upon the first charged "purpose":—*

This charge of purposed "debauchery" necessarily involves the "guilty mind", the *"mens rea"*, the dire intendment deliberately had in the mind of the defendant, and the determination of the presence or the absence thereof. We refer here to our treatment of that proposition *supra*, in our general arguments, reiterating that we cannot conceive of its being present. Upon this element the religi-

ous state of mind and the sincere belief in the divinity of the requirement of that belief surely have proper application. At all events, had this been his intendment, it was too late at the time of this trip.

*Upon the second charged "purpose":*

"For the purpose of having sexual intercourse with" this woman. Surely that charge comes rather belatedly. These people had no reason to make this trip for that purpose. No valid reason such as this could be present. They already were free, as between themselves, to do so anywhere. This was an old practice with them, in Utah. Certainly any such act between them while on this trip was but incident to their taking their "honeymoon"—and that was as per prior promise to give the woman a nice trip and a relief from the usual. No such purpose could have ac-

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*The Mormon marriage ritual used in all cases, polygamic or otherwise, is as follows:

"Do you Brother ..... take Sister ..... by the right hand to receive her unto yourself, to be your lawful and wedded wife; and you to be her lawful and wedded husband, for time and all eternity, with a covenant and promise on your part, that you will fulfill all the laws, rites and ceremonies, pertaining to this holy order of matrimony in the new and everlasting covenant, doing this in the presence of God, angels and these witnesses of your own free will and choice?

"Do you Sister ..... take Brother ..... by the right hand, and give yourself to him, to be his lawful and wedded wife for time and for all eternity, with a covenant and a promise on your part, that you will fulfill all the laws, rites and ordinances pertaining to this holy order of matrimony, in the new and everlasting covenant, doing this in the presence of God, angels and these witnesses, of your own free will and choice?

"In the name of the Lord Jesus Christ, and by the authority of the Holy Priesthood, I pronounce you legally husband and wife, for time and all eternity; and I seal upon you the blessings of the holy resurrection, with power to come forth in the morning of the first resurrection clothed with glory, immortality and eternal lives; and I seal upon you the blessings of thrones, and dominions, and principalities, and powers and exaltations, together with the blessings of Abraham, Isaac and Jacob; and say unto you, be fruitful and multiply and replenish the earth, that you may have joy and rejoicing in your posterity in the day of the Lord Jesus. All these blessings, together with all other blessings pertaining to the new and everlasting covenant, I seal upon your heads through your faithfulness unto the end, by the authority of the Holy Priesthood, in the name of the Father, and of the Son and of the Holy Ghost. Amen."

—Mill. Star, Vol. 15, page 44.

tuated this journey. This journey was unnecessary to its accomplishment.

*Upon the third charged purpose:*

"that the aforesaid woman should be and act as his mistress and concubine."

This charge also comes belatedly, at and under the most severe view. That could not in reason have had anything to do with this journey; for that condition if it may be held to be so was long prior to this trip fully accomplished. It could not have been any part of any actuating motive for this interstate travel.

No one of the "purposes" related in the indictment could have anything to do with this transportation; its motive; its purpose, or the intendment of either of the parties to it. Hence, the Mann Act cannot be called into the matter.

The conviction of this defendant in this case must be reversed. Any "immorality" occurring in Wyoming as a result of this trip was only incidental thereto. It cannot be said to be, in any sense, either the "purpose" or the "reason" for making of the interstate journey.

*Case No.* 24 (2946) (R. pp. 40-46)

*Cleveland* v The United States.

The charge here is: that this defendant did transport, interstate, MARCIA COVINGTON, from Salt Lake City, Utah, to Los Angeles, California,

> "for the purpose of debauchery, and for the further immoral purpose, to wit, for the purpose of having sexual intercourse with the aforesaid woman,—, and for the further immoral purpose that the aforesaid woman should be and act as his mistress and concubine,—" etc. (R. 40)

The stipulation (R. 7), covers all of the matters offered as testimony by the Government in this matter. The defendant's plea thereto was "Not Guilty".

*Summation of the Testimony*

The defendant met this woman some time prior to April, 1942, when she was 17 years of age. No sexual intercourse occurred between them until after his "marriage" with her. *On April 5th* this woman "consented to enter into plural marriage with defendant" *It was agreed that he take her to St. George, Utah, there to be "married"*. When they arrived at St. George, Utah, they found no one to perform the ceremony. *They* thereupon *agreed to go to California, "there to be 'married' by* a member of the cult." Upon their arrival in California they were not actually married and *did not engage in sexual intercourse until consent for such 'marriage' was obtained" from this woman's father.* Thereafter, they were "married" in plural marriage on *the 12th* day of April, 1942, *after* which marriage", they, "spent the evening and night at Hermosa Beach", —, "at an automobile tourist cabin". *"The next day the defendant took Marcia Covington to see some relatives;—Marcia Covington stayed* with these relatives and refused to go further with the marriage."

## ARGUMENT

Was the purpose in the mind of this defendant "debauchery", or "marriage" such as he and she both sincerely believed to be the order and command of God? As the opinion of the Circuit Court of Appeals shows (R. 117) it was "marriage" and "living together as husband and wife".

Of course, no contention can be made that any "debauchery" was by the defendant intended. His acts destroy any possibility of that. He took her first to St. George, Utah, "there to be married". No one being at that place to perform the ceremony, they agreed to go on to California "there to be married". He took her to and consulted with her father. Her father consented to the "marriage". He was of the like religious belief with these two people. He had no thought that the "marriage" would "debauch" his own daughter. He believed debauchery was deserving of the death penalty. Still there

had been no sexual intercourse between these people. From the 5th to the 12th days of April, they refrained from any such intercourse though they each knew that that was essential to their full conformity to their religious tenet, the "multiplication of children of good and worthy fathers, who will teach them truth, and train them in holy principles of salvation". (l. s. c.) All of them, father, daughter, this defendant, sincerely believed that "Concubinage is unknown among the Latter-day Saints." (l. s. c.) And so, containing themselves, this defendant and this woman, awaited the sanction of the "marriage", to accomplish which they had made the journey interstate, before they would so much as countenance their sexual union. The defendant, *the very next day* following their "marriage" took this woman to visit her relatives; she remained with them. This shows no depravity comportable with the usual meaning attributed to the word "debauch".

These people never intended to go to California in the first instance. Their joint intent and purpose was to proceed to St. George, in Utah, and there be "married" by a priest of their cult, after which they intended, no doubt, to carry out the mandates and purposes of that marriage. The "marriage" was the primary and actuating purpose of their trip in the first place. Disappointed at St. George, Utah, *they "agreed" to continue on to California and there accomplish their actuating and primary "purpose"* This they did. Certainly, all fair-minded persons must conclude that the "purpose" of their journeying was their "marriage" in form they believed to be the "very command of God". Therefore, the second assigned "purpose" set out in the Indictment, falls. Celestial glory, and the necessary actions to attain the same, as each of them, and her father, believed true, was their primary and actuating motive and purpose. Who are we to question it? We do not even suggest that religious belief gave them a right to practice polygamy, but we do insist that their religious belief removed their actions from the category of prostitution or debauchery.

The "purpose" to have sexual intercourse with this woman, as the actuating motive and "purpose" of the de-

fendant in this transportation interstate disappears.

Now, as to the final alleged "purpose": Let us again refer to Parley P. Pratt, and his statement of the case, (*loc. primo cit.*) of this brief. "Concubinage is unknown among the Latter-day Saints. *Wifehood, in the fullest sense of the word, is conferred by the marriage covenant.*" This defendant fully believed and accepted that statement. Any intent to make this woman his "concubine" or "mistress", consequently, could not possibly reside in his mind. No such conception was in the mind of the women when she "agreed" to this relationship; and, consequently, every intendment or "criminal intent" necessary to the affirmation of the conviction below of this defendant, on this charge, falls.

*Case No.* 25 (2947) (R. pp. 46-54), *Cleveland* v. The United States.

The charge here is: That this defendant, on the *9th day of August*, 1942, did transport, interstate, MARIE BETH BARLOW, from Salt Lake City, Utah, to Grand Junction, Colorado,

> "*for the purpose of debauchery and for a further immoral purpose, to-wit: that the aforesaid woman should be and become his mistress and concubine*",

Note, *only two purposes charged.*

Let us see what the record shows as to these matters (R. 7), excluding, as we have explained *supra*, all extraneous matter:—

*Summation of the Stipulation*

She bore a child by defendant on the 10th day of December, 1941. (R. 8). Prior to his living with her he had gone through the religious "marriage" ceremony, a full copy of the ritual of which appears in the footnote (*loc. primo cit.*).

She was fourteen years of age when she so "married" the defendant.

She had been made a ward of the Juvenile Court in Utah, as the result of the birth of this child. Defend-

ant secreted her to avoid the interference with their relationship by the said Juvenile officers, and disclaimed that she was in Utah for that objective.

Her parents believed as did she and this defendant on the subject of "celestial" marriage. They agreed that a divorce be had from defendant's legal wife so that she might become such. This was done.

In September, 1943, she gave birth to a second child by defendant, *after the transportation here charged.* (R. 9.)

Defendant transported her to Grand Junction, Colorado, from Salt Lake City, Utah, on the 9th day of August, 1942, and she there lived with him thereafter *as man and wife.* (He had informed another of these women that his purpose for that bringing her to Colorado was that "she might become pregnant".) He slept alternately with her and another woman thereafter in Colorado, but she did not become pregnant.

On September 18, 1943, she gave birth to another child by defendant, at Salt Lake City, in Utah.

## ARGUMENT

Let us consider the "purpose" first alleged; "debauchery" of this woman.

The defendant had "married" her in the year 1941, some time prior to December of that year. Of course, under the beliefs of these people, sexual intercourse, for the purpose of procreation, must have immediately followed.

We believe it idle to argue that the purposes of procreation of children to be reared in the respect and fear of God, might in any sense be held to be an intent to "debauch" their mother. That would be perfectly silly. It would be equally silly to argue that that "purpose" did not underlie the "marriage" of these people, as they conceived it. That "purpose", the propagation and rearing of such children, is an integral part of their religion. They—all of them—believe such to be the very edict of

the Almighty, directed especially to them. We decline to take any such inane position, or enter such a silly discussion. That purpose of these believers is an established fact, the debate of which would be quite inane. A purpose to have children is not what the White Slave Act aims at. That purpose is a concern only of the states. All of the testimony of the Government, here contained in the stipulation, conclusively refutes any such inference of any intent on the part of this defendant to "debauch" or to "debase" this woman. The whole of it, when considered in the light of their communal religious and sincere belief, conclusively refutes any such imputation concerning the "purpose" alleged. There remains no room for any doubt about this, reasonable or otherwise.

Let us pass now to the second alleged "purpose" of this interstate transportation, *on the 9th day of August*, 1942: —to make a "mistress" or "concubine" of this splendid woman.

We readily assent to the proposition that, ordinarily, the particular date alleged as that of the commission of an offense, is somewhat irrelevant, if the crime and its commission be proved at a date approximating that alleged; but, may we observe, here we have a matter where the dates involved have peculiar application.

If there ever did exist in the mind of this defendant any specific intent to subject this mother to the state of "concubine", or "mistress", when did that intent come into being? Was it conceived as a preliminary to the transportation here alleged? Certainly not. That had already been accomplished, if that had been defendant's purpose or intent. The alleged intent to make of this woman a "concubine" or "a mistress", could not have arisen at any time simultaneous with or present in the mind of this defendant at the time of the transportation. If it existed at all it arose long prior to that time, and had been completely accomplished.

In no one of the three cases appears any proof, worthy of the name, of any one of the charged "purposes";

In no one of them appears any act or doing whatsoever, consonant with those dire matters intended by the Congress to be curbed and punished, when it enacted the Mann Act. Everything even remotely shown in these matters has no relation whatsoever to those revolting practices, for profit, and so in "commerce", properly to be regulated by federal enactments, intended by the Congress when it enacted this statute. All are completely foreign to any of the Congressional intendments. And so, not within the purview of the Mann Act.

So much for this series of three of this series of cases so assiduously prosecuted, as the Honorable Judge Kennedy has so potently remarked, "*It is stipulated that the defendant committed said acts as a believer* in the practice of polygamy—and that in so acting he was practicing the original doctrine of his church." (R. p. 15), and "*This* in a way forces the Court to the unenviable situation of sitting in judgment between factions in a Church fight." (R. 23)

And so we say: This defendant cannot be held to have been lawfully and Constitutionally found guilty of any intended violation of the Mann Act, in any one of these three charges and indictments, all being beyond the powers of the Federal Goverment. What he did was a concern of the states alone, for not yet has the federal government been given any power over marriage, nor to punish sincere but illegal marriages. The marriages here were not such tricks or subterfuges as are usually employed by people seeking places for illegal sexual intercourse; they were sincere, binding, religious contracts followed by family life and children, many children. The defendants may be misguided, indeed misinformed concerning which must predominate, a law of man or a law of God, but not even their direst enemies could accuse them of prostitution or debauchery. If their marriages are illegal let the states handle them; for illegal or legal the status they entered was in every respect marriage.

* * * * * *

*Case No.* 26 (2948) (R. pp. 54-70), *Darger v. The United States.*

The indictment here charges that this defendant transported. interstate, JEAN BARLOW, *"on or about the 17th day of July,* 1942", from Grand Junction, Colorado, to Salt Lake City, Utah, *"for the immoral purpose that the aforesaid woman should be and live* with him as his mistress and concubine"; etc. (R. 54).

The stipulated testimony (R. 56), when condensed, is as follows:—

## SUMMATION OF TESTIMONY

During July, 1942, the defendant had two plural "wives" in addition to his legal wife, with which two women he had gone through the religious "celestial" marriage ceremony.

For some time prior to the date of this alleged unlawful transportation, the defendant had been employed as a contractor in Colorado, and there lived with this plural "wife, Jean Barlow" as husband and wife. Leaving his work he took this woman to their home in Salt Lake City, crossing the Colorado-Utah line in so doing. At arrival in Salt Lake City, he resided there with this woman and two other women, likewise his "wives", one being such as recognized by the civil laws, "in a state of plural marriage". The length of his stay at the Salt Lake City home at this time is not shown. He did return to Colorado and completed his work there, after which he returned to his Salt Lake City home and resumed his former state and condition.

## ARGUMENT

It appears to us that no fair-minded person could believe that the transportation here could possibly have been to accomplish the charged purpose. All intendment reasonably to be drawn from this testimony is that defendant was doing some work in Colorado, temporarily requiring his residing there; Jean Barlow lived with him there as his "wife"; that work being nearly completed, and for some good reason, she desiring to return to their

home at Salt Lake City, he took her there, and she there stayed while he returned to Colorado; later again coming to and living with her and his other "wives" in Utah.

No purpose to establish this woman as a concubine or mistress can be said to be the actuating motive for the transportation interstate. The purpose was to return her to her Utah home. He did not stay any length of time in Utah; but, we must assume, immediately on returning this woman to her home, returned to his work, finished the same, and came home himself. The only possible purpose which can be said to have brought about the trip to Utah was to return the woman to her home there.

And let it not be forgotten that this defendant, and this woman each sincerely believed that the form of marriage they had entered could not make of her any "mistress"; could not make her a "concubine". Such an intent to degrade her was as far from the mental concepts of these people as can be imagined.

Here, reversal must be had for:

No "criminal intent" is shown;
No "purpose" required by the Mann Act has been shown.

Every intendment must be presumed innocent, until overcome beyond every reasonable doubt by competent evidence. Such presumption has not been so overcome. It has been, if affected at all by the stipulated testimony, thereby fully established.

We submit that this conviction must be reversed.

* * * * * * *

*Case No.* 27 (2949) (R. 70-78) *Jessop v. The United States.*

The indictment here charges that this defendant, *on the 10th day of July*, 1943, transported, interstate, Mae Johnson, from Short Creek, Utah, to Short Creek, Arizona, "*for the purpose of debauchery*, and for a further *purpose, to-wit, that the aforesaid woman should be and become his mistress and concubine*", etc. (R. 70).

The full stipulation in this matter appears at R. 72. From the stipulation, we make the following

## SUMMATION OF TESTIMONY

The defendant "married" this woman in the month of *January*, 1941, under the rite, the form of which appears *supra*. After that "marriage", defendant established two households, one for this woman in the State of Utah, the other for his "legal wife" in the State of Arizona, which said homes were but a short distance apart, viz: about two miles, the state line separating the homes. This establishment continued for some two and one-half years.

That time having elapsed, the legal wife went away from her home, and this "wife" came to the former's home and there stayed and lived with the defendant, so continuing, and not changing anything except her place of residence. The relationship between her and the defendant was not thereby altered, but went on as before. The wife recognized by the civil law was married to the defendant in the year 1926.

This legal wife, at the time of the stipulation made, was the mother of nine children, the defendant being their father.

The other "wife" had but one child, *born April* 7, 1943. The absence of the "legal wife" was for about a week.

During the absence of the "legal wife", the other "wife" came to the absent wife's home and there cohabited with, and was seen in bed with the defendant.

No other testimony, set out in the stipulation, can be of aid in this matter, as we view the same.

## ARGUMENT

Let us examine the testimony and ascertain the real purpose underlying the move of this woman across the line and into the other woman's home: The Court must take judicial notice of the "Mormon" teachings on these matters, viz: that the second "wife" comes into the family with the full assent of the first, or legal wife. (Hilton

v. Roylance, 25 Utah 129, 69 P. 660)

We must therefore conclude that in the year 1941, with the assent of the legal wife, the defendant married Mae Johnson; established her in a home but a short distance from that of the legal wife; cohabited with her; had a child by her, which was but three months old at the time of the charged offense. The legal wife, with nine children in the home, went away on a visit. Those children could not be left without someone of adult age in that home. The father required someone to do the housework incident to the continued maintenance of this home in Arizona. The children in that home needed a woman's care. What more natural than for the second "wife" to come to the legal wife's home and do those family essentials, the cooking, the seeing to the cleanliness, etc., etc., necessary there to be done while the mother of those nine children was away? Such would be the same as if an aunt had come to that home and lovingly looked after those youngsters. One is as natural as the other. And such was the motivating reason and purpose for which the second "wife" was brought across the line,—not to accomplish the already accomplished "debauchery", if these facts permit of the application of that term in any sense,—certainly not to accomplish the already long accomplished status of "mistress" or "concubine", if those words may be here applied at all. No, such was not the purpose of that aid given the family of her joint wife.

Any sexual indulgence, if such occurred,—as to which nothing appears with certainty in the record,—between this defendant and Mae Johnson while she sojourned in the Arizona home, cannot be reasonably held to have been the motivating impulse for the coming by her to the Arizona home. There was no need for it, nor any requirement whatever that such transportation be made for any such purpose. Any such sexual indulgence must be reasonably held to have been but an incident to the being there of Mae Johnson,—in no sense the motive impelling her presence there, or her coming to that place.

Hence, we have no "purpose" shown as alleged; or any other purpose cognizable at all under the clear import

and proper construction of the Mann Act. No such crime is made out. As a matter of fact and common sense, the stipulated testimony completely negatives the alleged "purposes" set out in the charge.

When the whole of this matter shall be fully considered, the charge, the plea, the stipulated testimony, and the religious beliefs and concepts of all of the people concerned, looked at and considered as a whole, certainly this conviction must be reversed.

* * * * * * *

*Case No.* 28, 29 (2953-2954) (*R.* pp. 94-106), Dockstader *and Stubbs v. the United States*

Here the information charges these defendants with the knowing participation as a party principal in the transport, interstate, of one Anna Lindgreen, from Salt Lake City, Utah to Short Creek, Arizona, on or about the 15*th day of July*, 1943, "*for the purpose of debauchery* and for a further immoral purpose, to-wit, that the *aforesaid woman should unlawfully cohabit with Theral Ray Dockstader, one of the defendants herein, as his mistress and concubine*", etc (R. 94)

From the stipulated testimony, (R. 97), we make the following

SUMMATION OF TESTIMONY

*As to the defendant Dockstader*:

In the fore part of July, 1943, this defendant maintained two homes, one in Salt Lake City, Utah, in which his "wife", Anna Lindgreen, was residing, the other at Short Creek, Arizona, in which his wife, Leah, was living. He had "married" Anna Lindgreen *prior to the month of April*, 1942, considerably more than a full year prior to this transport of her to Arizona, as a believer of and a participant in the ritual hereinbefore set forth, with the attendant beliefs as to the purposes and obligations thereby undertaken, as by that doctrine announced.

We must conclude that Dockstader had, for more than a year prior to this transport, lived with this woman in Utah, as husband and wife; had "cohabited" with her as a

wife; had fully accomplished all possibility of any charge here made, if the same has application, in Utah.

He and Anna, his "wife" in Utah, jointly "made arrangements for this transport with another of the like sincere religious belief as they", (the defendant Stubbs), who it is said "knew that said Theral Ray Dockstader was living in plural marriage with said Anna Lindgreen and Leah Kilpack Dockstader", which it is shown had long been existing, as to Anna, in Utah. Thereafter, and pursuant to their joint engagement of Stubbs, this transport was made of Anna to Arizona, and thereafter, in Arizona, *the long existent relationship* between her and Dockstader *was continued. It was not begun there.* (R. 98)

All of these people, it is stipulated, "professed a belief in plural marriage as a prerequisite to salvation under the original concepts of the Mormon church, * * *." (R. 98)

Now, as to the defendant Dockstader, what was his purpose in removing his "wife" of long standing from Utah to Arizona? Could any reasonable person conclude that the transport was essential to any accomplishment by him of the fell design and purpose alleged in the indictment? We think not. (We can see no purpose disclosed for this taking of his "wife" from Utah to Arizona more damning than to make living with her more convenient or for some other like purpose, financial, perhaps. But, the *real purpose cannot have been that charged.*) That purpose, if ever resident in this defendant's mind, was already an accomplished thing,—a thing long consummated. This trip could add nothing to that.

Now let us look at the stipulation as to the defendant Stubbs: Upon such we make the following

## SUMMATION OF TESTIMONY

Stubbs verily believed the religious doctrine of the original Mormon Church, including its tenet of plural marriage. (R. 98)

He was a member of the religious cult to which these de-

fendants all adhered. He transported this woman to Arizona in his truck, with knowledge of her former and intended continued relationship with the defendant, Dockstader, at the joint request of each, Dockstader and Anna Lindgreen. R. 98)

## ARGUMENT

All that has been said as to the Defendant Dockstader as to intent, purposes, etc., can be likewise said of this defendant. He knew, as the government's witnesses would have testified, that these two people had long been associated in Utah in the same relationship that they proposed to continue in Arizona. But,—neither here nor with the other defendant,—does any certainly established intent either to debauch or to make a new mistress or concubine of this woman appear as the intent of either defendant. There are literally hundreds of good reasons other than such charged for a removal of a family from one state to another, whether that family be recognized by the laws of the states involved as legal, or otherwise. It still remains, in the minds and hearts of these people, a bona fide and proper family.

And so, this defendant must be likewise held not guilty and his conviction reversed.

* * * * * * *

*Case No.* 30 (2955) (*R. pp.* 106-115), *Petty v. The United States*

Here the indictment charges a transportation, interstate, by the defendant of one Mary Marguerite Ford, from Idaho into Utah, *on the 11th day of August*, 1943, "for the immoral purpose that the aforesaid woman should be and live with him as his mistress and concubine"; etc. (R. 106)

We make the following

## SUMMARY OF TESTIMONY

No testimony was offered by the defendant. The pertinent testimony of the government is contained in the stipulated testimony. (R. 108). It shows:—

Defendant had been and was at the time married, lawfully, to Ivy Campbell Petty, so marrying her in the year 1913. Mary M. Ford, in 1932, was an adult woman, holding a position in a public office in the State of Idaho. She was also doing work for an organization of the Mormon Church. She became acquainted with the defendant and his wife in the year 1934. (R. 108). This defendant's legal wife made a proposal to Mary M. Ford *in* 1934, that she "marry" the husband of the legal wife. Miss Ford, studying and becoming converted to the Mormon doctrine of plural marriage, believed in by each the defendant and his legal wife, in July, 1934, so "married" this defendant at Salt Lake City, Utah. She then returned to Idaho where "she continued to live with her mother", but engaged in sexual intercourse there with the defendant "regularly", in the absence of the legal wife, but at her home and home premises.

She became pregnant, (at what time is not disclosed by the record. We must assume, however, that under the circumstances disclosed, such condition came about rather soon after her "marriage".) Thereupon the defendant removed her to Utah. (This transportation is not any part of or in any sense connected with the crime here charged.) We assume that this move was made in about the year 1935, or late in 1934. She bore defendant three children in Utah, registering their births under the surname "Petty", though other names were shown as to the parents. In *January*, 1943, defendant moved this Utah family from Salt Lake City to Providence, in the same state, where Mary M. Ford, and her children, continued to reside until after the transportation here charged; the defendant *continuing* to live with her there as his wife, and so lived with the said two wives, alternately. (R. 109). In *July*, 1943, "the defendant consented" to her paying a visit to her cousin in Idaho, at the town of Driggs, which is at some distance from Pocatello, Idaho, where the defendant maintained his residence with his legal wife, the defendant supplying her transportation for that purpose. She paid that visit, and after it was ended came to Pocatello, and "*through her mother*" "*got in touch with defendant*". Thereupon, the defendant took her in his car back to her

home in Utah, so crossing the line between Idaho and Utah. No sexual relations were had by them in Utah at that time, though such were proposed by him and refused by her. No sexual relations are disclosed by the testimony of the Government as having occurred between these two people at any time since. He has since refused to support this woman.

## ARGUMENT

The testimony of the Government again shows:

This defendant might have been, but for the statute of limitations, charged for his transportation of this woman to Utah in late 1934 or early in 1935. That disappears, however, from this picture. It is but "window dressing", but we have thought proper to include it nevertheless in our summary above. It does disclose the over-ardent efforts of the prosecutors to succeed in this case.

This woman had lived in a home provided for her in northern Utah for a number of years. She continued to reside there at the time of the charged offense here. She was not brought back to it from her visit with her cousin for any purpose other than to get her again to her home. Any attempt to engage in any sexual relations at that time, or later, made by the defendant, were repulsed by her. Such were but incident to their long established relationship and their consonant joint religious beliefs.

Certainly a jury would not have been permitted to have considered this case, had one been impanelled, in the face of motion for dismissal made.

Certainly the fell "purposes" set out in the information here are completely exploded by the government's own testimony.

Certainly no newly arising situation came into being, or was contemplated by this defendant or this woman to be accomplished by this interstate journey. Hence the legal purpose fails to proof, and the case must be dismissed and the conviction reversed.

* * * * * *

*Case Nos.* 31, 32, 33 (2950-2952) (*R. pp.* 78-94), William *Chatwin v. The United States.*

The indictment here charges this defendant, jointly with Zitting and Edna Christensen, with unlawfully decoying, inveigling and carrying away, Dorothy Wyler, a minor child, aged 15 years, on August 15th, 1941, and thereafter continuously holding said child to the 9th day of December, 1943, and in that period, viz: *on the 1st day of November,* 1941, *transporting said child from Provo, Utah, to Short Creek, Arizona,* etc. (R. 78)

The stipulation (R. 80) may be fairly summarized as follows:—

## SUMMARY OF THE TESTIMONY

*Chatwin was a widower in* 1939. One Lulu Cook resided with him at his home in Utah. (R. 81)

In August, 1940, he sought Dorothy Wyler as a domestic in his home, to which her parents consented. She was then 14 years and 8 months of age. She was subnormal mentally, being of the mental age of 7 *years and* 2 *months, with an I. Q. of* 67. At the time of Chatwin's arrest, she had developed to a "high grade moron with an *I. Q. of* 64, *and a mental age of* 9 *years and* 8 *months.*" She went to his home and was so employed, and she was there taught by both Lulu Cook and Chatwin that "celestial" or plural marriage was essential to her salvation, he relating to her that her grandmother desired her to marry him. She became converted to the doctrine.

After she had come to believe, she became pregnant, and such was discussed by her parents who made complaint to the juvenile authorities, and she was taken into their custody August 8th, 1941. On the 10th of August, 1941, she attended a show with the matron, was there allowed to remain alone, left the showhouse, met two daughters of this defendant, and they supplied her with means to go to Salt Lake City. Arriving there she remained in the home of others of this cult, until the time of the trip to Mexico for her marriage there to this defendant, and subsequent return to Utah, and thence to Short Creek, Arizona. She verily believed that she should abide "by the law of God rather than the law of man". (This is a

religious doctrine accepted by the largest body of the followers of Christ in this world, and is hoary with age, and completely respected.)

*These defendants convinced her,* (and so she acted) in going to Arizona and there residing with this old gentleman until she had come to her majority, she being pregnant, that she should remain in hiding.

We make no point of the fact that the transportation alleged in the information is not proved as having been begun at Provo, Utah. It appears that an interstate transport was made, but begun at Cedar City, as we read the testimony. It may be that the transport claimed here against these defendants was that from Juarez, Mexico, to Cedar City, Utah. We cannot say. That an interstate transport was made is shown by the testimony, however. Or it may be that the transport claimed is that testified to, from Salt Lake City, Utah, to El Paso, Mexico.

Establishing his new legal wife at Short Creek, Arizona, Chatwin and she lived there for some time; two babies, both perfectly normal children, were born there to them. She became nearly 18 years of age,—was within a very short time of that event, when he was taken into custody under the charges here made.

## ARGUMENT

Since when did an elopement with a minor, be she the ward of parents or a juvenile court, constitute the dire offense sought to be charged and punished in this indictment?

There was a perfect willingness in the woman. This old gentleman could not have had any delusions of the new responsibility he was assuming by this marriage. It is significant that he is not shown charged by State authorities with any contribution to any delinquency of this minor, for which the laws of Utah supply ample punishment for him, were he guilty of that offense.

While this girl was "persuaded", or "convinced" that she would be justified in doing as is testified to, it is not

shown anywhere by what means that came about other than discussion of religious tenets and laws. It is not shown in what that "convincing" consisted. Certainly there is not so much as an intimation of force.

Here the girl, now a "high grade moron", was and now is completely competent to know and appreciate her pregnant condition, with all that that entailed, if she remained unmarried. Common sense tells us that that was no small element in her determination to escape and marry this old man, legally. (No one will contend that their marriage was void. At most, it was but voidable. No effort is shown having for its object the disaffirmance of this now completely valid and lawful marriage.)

This lack of showing is as significant as could be anything in this situation.

No,—this old gentleman, having done the decent and manly thing toward this girl, by him pregnant,—married her.

The testimony that he had theretofore "married" her under the "celestial" rite held to be valid in his mind, and in the minds of these fellow defendants, was the factor bringing about his arrest and the charge here.

In the argument before the trial court, where all of this series of cases, and all of these defendants were being discussed, Knox Patterson, Esq., of defense counsel, gave this series of prosecution the appellation: "BOYDEN'S CRUSADE."

We say that, except that this crusade has been initiated, and except for the determination of the prosecutors to reach every one whom they so much as suspected of any practice of "celestial marriage", in which they were actively assisted by the dominant Mormon Church and its priests,—as Judge Kennedy so aptly stated in his opinion: "* * * There was evidently a split in the Church, which is not unusual in all classes of Churches, and the adherents of the polygamic doctrine, calling themselves 'Fundamentalists', to which the defendants purport to belong, have appeared as not only earnest advocates of po-

lygamy, but have practiced it literally. *This in a way forces the Court to the unenviable situation of sitting in judgment between factions in a Church fight.*" (R. 23).—no charge would have been brought in this case. Clearly this elopement,—for it can have no other proper designation,—came to be under the force of that "crusade", a violation of the Lingbergh Act, and the defendants deserving of the death penalty.

There lies the whole of the force of the prosecution here.

We most earnestly urge: The Lindbergh Act could not have been thought to include any such situations by the Congress that enacted it. Hence, this case, and these convictions ought to be reversed.

* * * * * * *

*Cases Nos. 32 and 33, Zitting v. The United States,*
and
*Christensen v. The United States*

These two matters are jointly treated, and these two defendants are jointly charged under the same indictment, as is the defendant Chatwin in case. (R. 78)

The stipulation covers them all. (R. 80)

If Chatwin cannot be held to have come within the Congressional intent with respect to the Lindbergh Act, certainly these defendants, who but aided him, cannot be punished thereunder.

We, therefore, adopt the treatment which we have given Case No. 31, supra, as applying here in each of these matters.

* * * * * * *

*GENERAL STATEMENT*, AS TO EACH OF THE THE ABOVE CASES:

Let it be observed: Not a single one of the women named in this whole series of cases has been shown to have been unwilling. Every one of them, on the contrary, by the government's own stipulated testimony, has been shown to have been equally anxious with her re-

spective "husband", to do as those husbands are here alleged to have done.

The item, under both of these Acts, the Mann and the Lindbergh, as we read those statutes, is an indispensible element necessary to be proved in reverse, viz: That such victims must have been either actually and physically forced, or by trickery, amounting to an overcoming of an independent and contrary mind amounting to a comparable and a similarly condemnable force. None such here appears in any case.

In not a single case does there appear any commercial element.

Not a single instance is shown of any "prostitution" of any woman, for the purpose generally understood where that word is used.

Not a single case of "debauchery", in the generally understood meaning of the word. To find this element present in any of the Mann Act cases, this Court will be required judicially to determine:

The truth or falsity of the religious doctrine and belief of these people, and the "revelation" from which it stems; and

Having so determined, declare their marriage system to be a form of "debauchery". This will stretch that Act to the breaking point, and there will inevitably follow any such declaration, a literal flood of religious cases, involving similar elements sought to be ruled as moral or immoral by the federal courts. The Mann Act, thereby, would be made the instrument of injustice and vengeance feared by those members of Congress debating it, and so a pure police measure, having no real relationship with "commerce", or the delegated power to regulate that activity between the several states.

This illustrates that such a decision, affirming these convictions, or any one of them, will bring into the federal jurisdiction such a great quantity of new litigation as will utterly clog those courts. It will be another federal assumption of state prerogatives.

In every one of these cases an innocent intendment has been clearly shown by the testimony of the government. The pleas of the defendants, thereby, are sustained.

This Court has said, most appropriately, upon the subject of the religious belief of these defendants, and their womenfolk, their families and children:—

> "Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law."
>
> United States vs. Ballard, 322 U. S. 882.

Again, on the subject of mental concepts, and so the matter of intent, this Court has commented:

> "Heart and mind are not identical, Intuitive faith and reasoned judgment are not the same. Spirit is always thought. But in the every-day business of life, secular or otherwise, these variant aspects of personality find inseparable expression in a thousand ways."
>
> Prince v. Commonwealth of Massachusetts, 321 U. S. 158.

* * * * * *

Since the institution of the prosecutions herein the State Courts of Utah have proved that they can handle their polygamy cases without the benevolent interposition of the federal courts, otherwise some of these defendants would not already be in the State Prison; hence the federal government need no longer use its imagination to make kidnaping or prostitution and debauchery out of plain polygamous marriage. Nor need ardent prosecutors belonging to a dominant church further seek to prostitute United States statutes in behalf of that church. The strong arm of the federal government has been lifted out of place, but its blow must not be permitted to strike.

## MOTION TO QUASH

This assigned error we have argued under the heading of the Court's failure to find that the challenge to the grand

jury was well taken. What we there say we re-assign here.

The facts here do not show any proper application of either the Mann Act (U. S. C. A. T. 18, Sec. 398) ,or the Lindbergh Act (U. S. C. A. T. 18, Sec. 408a).

There is no showing of the necessary and indispensible criminal intent in any one of these cases.

There can be no lawful finding that any type or form of religious marriage is within the meaning of the words "interstate commerce", which two words embrace every power under each of these Acts.

The matter of regulation, approval, disapproval and ban of all types and forms of marriage, religious particularly, but not exclusively, falls wholly within the police powers of the several sovereign states of this Union. No such police powers, direct or incidentally necessary for the enforcement of either of these acts, resides in the federal government. To hold otherwise requires the declaration that all marriage falls within the definition of "commerce", which cannot be.

The motion to quash should have been granted, *sua sponte*.

## THE KIDNAPING CASE

The indictment in the kidnaping case failed to state a public offense in that it did not indicate the purpose of the detention (R. 78). The petitioners moved to quash the said true bill (R. 84) on the ground that it "does not state an offense against the laws of the United States, and in particular does not state an offense under the Sec. 408a, T. 18 USCA". A motion to quash an indictment is a proper mode of taking objection to it for defect of form or substance (United States v. O'Sullivan, D. C. N. Y. 1851) (Fed. Cas. No. 15,974). *This objection was here taken before trial*, but, like a general demurrer, a motion to quash an indictment on the ground that it does not charge facts sufficient to consitute an offense may be made at any time, even after verdict (Cohn v. U. S., C. C. A. N. Y. 1919) 258 F. 355.* Since the indictments are each fatally defective, petitioners urge this objection here

again and move their dismissal.

Furthermore, the indictment is equally defective in that the words "unlawfully inveigled, decoyed and carried away" are wholly conclusions of law and are unsupported by the allegations of any facts to substantiate them. Petitioners have all along maintained that this indictment did not state facts sufficient to constitute a public offense. It is a fatal defect never waived; and, since the indictment is a legal nullity, there is little need for further argument on the Lindbergh case. *To show how serious this objection is, the petitioners are unaware, even at this late date, of what reward, ransom or other benefit the prosecution claims the defendants obtained or had in mind by the transportation, or what unlawful purpose they had in view.* It is doubtless that none existed and that is why the government failed to allege any.

## CONCLUSION

In conclusion let us say:

1. In the Mann Act cases, in every instance but one, the petitioner was already married to the woman involved; their relationship was one of respect and love; and there was not the slightest need to cross state lines to have sexual intercourse because that already was existing in their matrimonial lives. In the one case, marriage took place before intercourse. It is true that the marriage, being polygamic, was unlawful under Utah law; nevertheless, to the petitioners it was a sanctified relationship.

2. There was not the slightest evidence of prostitution or debauchery.

3. There was no evidence that the actions of the women were unwilling or involuntary; on the contrary the women gave the fullest cooperation to their marital status.

---

*OTHER CASES SUSTAINING THIS STATEMENT ARE:

U. S. vs. Nagle, F. Cas. No. 15,852 U. S. vs. Kuhl, 85 F. 624

U. S. vs. Myatt, 264 F. 442. U. S. vs. Schmidt, 15 F. Supp. 804

All hold that a motion to quash is the proper attack upon an indictment that fails to charge a crime.

4. The evidence is undisputed that the petitioners and the women were acting under what they considered to be a mandate from God.

5. The federal government has no jurisdiction over marriage.

6. By no possible construction of the evidence may the Court find that the petitioners intended to take their spouses into prostitution or debauchery.

7. The rule of *ejusdem generis* compels us to regard "other immoral purpose" in the act to mean either prostitution or debauchery.

8. The petitioners make no claim whatever that, under Utah state law, by reason of their sincere religious belief, they have a right to practice polygamy; but they do maintain that such practice is not within the purview of the Mann Act.

9. The federal government has no jurisdiction to declare upon the verity of any religion; here the "revelation" involved.

10. No declaration of immorality can here be made prior to a judicial determination of the verities of that "revelation".

We respectfully submit that the judgments below should be reversed.

CLAUDE T. BARNES
J. H. McKNIGHT
ED. D. HATCH
O. A. TANGREN,
*Counsel for Petitioners.*

# APPENDIX

## THE RELIGIOUS BACKGROUND OF THE DEFENDANTS

Under the charges, we feel that it is essential for the Court to have the full religious background of these defendants.

While *we do not claim that their religious belief can supply any defense upon* the charges as they may be *police regulation violations,* we do say that there is more,—greatly more—than that proposition of police regulations involved here, and that *their sincere religious convictions do have material involvement here upon the requisite showing of an intendment to prostitute* or otherwise debauch or render immoral these women and the family in each case involved.

Unless these prosecutions be held to be in furtherance of an exercise of the police power—which, by the way, was the controling element in the Reynolds case, where the police power did reside in the Federal Government, and where the holding is that the defendant knew of the law prohibiting the practice of bigamy, and his knowing violation of that police law constituted the crime,—then *the mere doing of a forbidden act, when that act is required, as here, to have been incited by an immoral desire and purpose,* fails of sufficient proof until the immoral intendment be proved as resident in the mind of the accused. That is to say: The proof here requires two separate elements to be both alleged and properly proved, viz: (a) the doing of the forbidden act, coupled with (b) an immoral purpose conscientiously resident in the mind of the accused at the time of doing such act. It is in this latter element of required proof that the mental and religious attitudes and convictions come into play with controlling force; hence, we give the following historical background of these accused.

In the early part of the last century, in the remote and comparatively uncultured western section of New York State, Joseph Smith, then a mere lad, declared that he had had actual converse with both the Father and the Son,

and had received instructions from Them how he should thereafter comport himself and what his mission in life was. Of course these statements were scoffed at and he became the butt of ridicule, and finally of persecutions that imperilled his life. He, however, persisted in his declarations, and finally gave his life in forfeit of them, at the hands of a mob at Carthage, Illinois.

In April, 1830, Joseph Smith, and five others, formed the initial organization of the "Mormon" Church. From that small beginning that organization has now grown to have a membership running near 1,000,000 persons, and is now one of the fast-growing religious organizations in these United States.

From its inception to the present, that Church has maintained that Joseph Smith, in very deed, did frequently converse with Heavenly personages, and from them received direct revelations of "the mind and will of God". That Church has no other claim to rightful existence. That claim failing, that great Church must fall,—be found wanting and false. Of course, this Court is not concerned with the determination of either the truth or the falsity of that fundamental element of that Church and that Faith of 1,000,000 Americans. Such a determination is, as is often declared by this Court, no function of, and falls within no jurisdiction of the Courts of either States or the Nation.

In the year 1843, the Prophet Joseph Smith, published one of the many such "revelations" to him, and the same is to be from then on until the present writing, found in that official guide to religion and faith of the "Mormon" people designated the "Doctrine and Covenants", and is to be read in full at Section 132 of that work. Preceding that "revelation" by some two months, there was likewise published in said doctrinal guide the 131st Section.

Each of those Sections has to do with marriage; its form, its continuance, and its nature and kind. Each of these Sections still appears in the "Doctrine and Covenants" and, together with the balance of that book, is officially and universally, adopted and claimed to be believed as being the very word of the Almighty to the "Mormon"

people. The 131st Section reads in part: "In celestial glory there are three heavens or degrees; and in order to obtain the highest a man must enter into this order of the priesthood (meaning the new and everlasting covenant of marriage)."

This 132d Section deals with the doctrine of plurality of wives. It deserves careful reading in connection herewith. It is too prolix to be set out in full. We call especial attention to the following verses of it:—

"1. Verily, thus saith the Lord . . . . .

3. All those who have this law revealed unto them must obey the same; . . . . . 4. and if ye abide not that covenant then are ye damned; for no one can reject this covenant and be permitted to enter in my glory."

61. " • • • If any man espouse a virgin, and desire to espouse another, and the first give her consent; and he espouse the second, and they are virgins, and have vowed to no other man, then he is justified; he cannot commit adultery, for they are given unto him; for he cannot commit adultery with that that belongeth to him and to no one else;

62. And if he have ten virgins given unto him by this law, he cannot commit adultery, for they belong to him, and are given unto him, and *therefore he is justified.*"

It is commonly known among the "Mormons" that this "revelation" was given to that people long prior to its publication in their doctrinal guide; that, among the leaders of that Church, with the Prophet Joseph Smith, the doctrine was accepted and practiced for some years prior to 1843.

It is needless for us to relate the reception this dogma received in their vicinity and among their opponents. We but mention the Mormons leaving of Kirtland, Ohio, where they had established a flourishing community; their hegira to the wilds of Missouri; their being driven

thence by mobs, in the winter and foul weather, and their going to the swampy and undesirable lands later by them named "Nauvoo, The Beautiful", a city then greater in population and place than the then Chicago; their flourishing there, their troubles with their neighbors there; their being driven from that city in the dead of winter, across the ice-covered Mississippi, to starve and freeze, and the deaths of many there from that exposure, women, children and men, young and old; their subsequent journey to the waste-lands of the great Desert, and their founding in that abandoned land, the present State of Utah.

This doctrine of "plurality of wives", maintained by them to be the very word of God, accounts for much of that trouble and woe.

After arriving in Utah, in the year 1852, the great Brigham Young, then successor to the Prophet Joseph Smith, openly announced that they should take up this practice in the entire Church. The people responded, and though many of them groaned from its burden and responsibilities, faithfully married many "wives" at the "command of God". Even today, that early Utah practice must be, and is, by the orthodox "Mormons" defended in its entire morality, and as having been done as aforesaid, "under the direct command of God".

The result was uniform, there in Utah, as elsewhere. This practice enraged their enemies. The result, as all know, was new legislation by the government, then Federal, banning and forbidding that marriage practice.

The "Mormons" resisted those laws with all of their might. Their ecclesiastical leaders went to jail for their violations. Violations, if you please, of pure police measures, properly enacted by the then proper sovereign. These "Mormons" maintained that they, in company with all Christians, notably those of the Roman Catholic persuasion, ought to "obey the laws of God, rather than the laws of Man", where conflicts came into being as to such; maintained that the practice was established as a "law and command of the Almighty", and so struggled against its

banning. Finally, the properties of the Church itself, and they were many and of great value, were confiscated.

By the year 1890, a great crowd of "Mormons", of all degrees, came to believe that it was more politic and more to be desired that they concede their former position and accede to the law. That issue was under constant discussion among the people for a number of years. It finally culminated in the so-called "Manifesto of 1890", under which the then 90-odd-year old President and Prophet, Wilford Woodruff, "said" that he proposed to obey the civil law and "advised" his followers to do likewise.

That "Manifesto" created a great confusion within the Church. Ten thousand of its members, assembled in its next semi-annual Conference, ratified and made that "Manifesto" a rule of the Church. Of the many thousands not so present and so voting, we say little, other than to mention that they were more numerous than those so assembled and so acting. Those not so doing were, also, of divided minds. The "rule of the Church", however, became just that.

Of course, that rule was regarded as not retroactive, and those who had, prior to its adoption, taken many wives continued to cohabit with them as formerly, for many years next succeeding. That such is the case is amply supported by the criminal charges brought, respectively, against the then succeeding President, Joseph F. Smith, and the like proceeding likewise brought against the late President Heber J. Grant, each in the courts of the new State of Utah; each of the accused pleading "guilty", each paying a fine. (See: State v. Joseph F. Smith, and State v. Heber J. Grant, each of record in the courts of Salt Lake County, Case No. 482 in 1899, and Case No. 1618 subsequent.

Following those proceedings, and with the passing of the years, the vigor of the defense of this doctrine, "the very word of God", was gradually lost, until at the present writing, its defense as a binding command has been entirely repudiated by the orthodox sect of the "Mormon" Church, and excommunications of all of these defendants

from that Church because of their unwillingness to do so, antedated the bringing of these prosecutions. Truly these accused are "Fundamentalists" in the "Mormon" faith and doctrine. They maintain, with all of their power, that 'the command' of the Almighty is not abrogated or cancelled by any actions taken by man.'

Such is their faith and sincere belief, so arising and so based and bastioned. This is conceded here.

Simultaneously with the repudiation of this doctrine as a present fundamental of the "Mormon" Church, the leaders of that Church, actually incited this series of prosecutions, and a like series under State law; supplied evidence to the prosecutors, and so compelled these accused to bring the fundamentals of the original and early "Mormon" faith here to be inspected, in order that their state of mind, whether guilty of an intended immorality comparable with prostitution or debauchery, or the like, may be looked into. And this in order that this High Court may determine if they could have had any such intendment while at the same time sincerely believing that they were actually carrying out the direct and specific command of God Almighty, to rear large families of healthy and well-mannered children, establish their family, in plurality, in a position such as will, as they verily believe, bring them all together in the Hereafter in a happy exhalted state.

That is the question here, for the first time presented, and which requires a search of their religious beliefs, practices, and reasons for such and the determination therefrom of that inescapably essential second element of the crimes here charged, viz: their "guilty mind"; their intendment to "prostitute", or to "debauch" those their loved wives, or to kidnap, or the contrary.

Their settled determination to violate a State police measure cannot be said to supply that element.

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Nos. ~~895-905~~ 23-33

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# In the Supreme Court of the United States

OCTOBER TERM, 1944

HEBER KIMBALL CLEVELAND, PETITIONER

*v.*

THE UNITED STATES OF AMERICA

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*v.*

THE UNITED STATES OF AMERICA

DAVID BRIGHAM DARGER, PETITIONER

*v.*

THE UNITED STATES OF AMERICA

VERGIL Y. JESSOP, PETITIONER

*v.*

THE UNITED STATES OF AMERICA

THERAL RAY DOCKSTADER, PETITIONER

*v.*

THE UNITED STATES OF AMERICA

L. R. STUBBS, PETITIONER

*v.*

THE UNITED STATES OF AMERICA

FOLLIS GARDNER PETTY, PETITIONER

*v.*

THE UNITED STATES OF AMERICA

WILLIAM CHATWIN, PETITIONER

*v.*

THE UNITED STATES OF AMERICA

CHARLES F. ZITTING, PETITIONER

*v.*

THE UNITED STATES OF AMERICA

EDNA CHRISTENSEN, PETITIONER

*v.*

THE UNITED STATES OF AMERICA

*ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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# In the Supreme Court of the United States

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the circuit court of appeals (R. 139–147) has not yet been reported. The opinion

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[1] Together with No. 896, *Heber Kimball Cleveland, Petitioner* v. *The United States of America;* No. 897, *Heber Kimball Cleveland, Petitioner* v. *The United States of America;* No. 898, *David Brigham Darger, Petitioner* v. *The United States of America;* No. 899, *Vergel Y. Jessop, Petitioner* v. *The United States of America;* No. 900, *Theral Ray Dockstader, Petitioner* v. *The United States of America;* No. 901, *L. R. Stubbs, Petitioner* v. *The United States of America;* No. 902, *Follis Gardner Petty, Petitioner* v. *The United States of America;* No. 903, *William Chatwin, Petitioner* v. *The United States of America;* No. 904, *Charles F. Zitting, Petitioner* v. *The United States of America;* and No. 905, *Edna Christensen, Petitioner* v. *The United States of America.*

of the district court (R. 15–27) is reported at 56 F. Supp. 890.

## JURISDICTION

The judgments of the circuit court of appeals were entered January 4, 1945 (R. 147–153). The petition for writs of certiorari was filed January 30, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

## QUESTIONS PRESENTED

1. Whether a religious belief in polygamy bars prosecutions under the Mann and Federal Kidnaping Acts.

2. Whether, if religious considerations did not preclude the prosecutions, the facts stipulated established violations of the Mann and Kidnaping Acts.

## STATUTES INVOLVED

Section 2 of the Act of June 25, 1910, c. 395, 36 Stat. 825 (18 U. S. C. 398), known as the Mann Act, provides in part:

> SEC. 2. That any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, * * * any woman or girl for the purpose of prostitution or

debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; * * * shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

The Federal Kidnaping Act of June 22, 1932, c. 271, 47 Stat. 326, as amended by the Act of May 18, 1934, c. 301, 48 Stat. 781 (18 U. S. C. 408a), provides in pertinent part as follows:

SEC. 1. Whoever shall knowingly transport or cause to be transported, or aid or abet in transporting, in interstate or foreign commerce, any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away by any means whatsoever and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall, upon conviction, be punished (1) by death if the verdict of the jury shall so recommend, provided that the sentence of death shall not be imposed by the court if, prior to its imposition, the kidnaped person has been liberated unharmed, or (2) if the death penalty shall not apply nor be imposed the convicted person shall be punished by imprisonment in the penitentiary

for such term of years as the court in its discretion shall determine: * * *

STATEMENT

Seven indictments charging violations of the Mann Act and one charging a violation of the Kidnaping Act were returned in the United States District Court for the District of Utah. The Mann Act indictments (Cases 895–902) charged the petitioners named therein with having transported certain women in interstate commerce for the immoral purpose of having them act as mistresses or concubines (R. 1, 47, 55, 56, 65, 85, 113, 127). The Kidnaping Act indictment (Cases 903–905) charged that petitioners Chatwin, Zitting, and Christensen unlawfully inveigled, decoyed, carried away, and held a minor child, age 15, for a certain period, and knowing her to have been so inveigled, held, etc., transported her from Utah by way of El Paso, Texas, to Arizona (R. 95–96). Each of the defendants waived a jury trial and consented to a trial of his case by the court on a stipulation of facts entered into by his counsel (R. 7, 13, 48, 57, 66–67, 86–87, 96–97, 114, 115, 128–129). The facts so stipulated may be summarized as follows:

Each of the petitioners was a member of the Fundamentalist sect which sanctioned plural, or, as they call it, "celestial"[2] marriages, and which

[2] A "celestial" marriage is a "religious ceremony according to the beliefs of [the] Fundamentalists, * * * but contrary to" state laws (R. 8).

petitioners claimed followed the original doctrines and practices of the Mormon Church (R. 8, 12, 67, 87, 98, 99, 117–118, 130). In each of the Mann Act cases except the second indictment against petitioner Cleveland (Case 896), the woman named in the indictment as the person transported had previously participated in a "celestial" marriage ceremony with a petitioner who already had a legal wife living, and the transportation which formed the basis of the indictment in each such instance was with the intent of continuing sexual relations with such "celestial" wife (R. 8–9, 11–12, 67–68, 87–88, 116–118, 129–131).[3] The transportation which formed the basis of the second indictment against Cleveland was for the purpose of having a "celestial" marriage performed, after which petitioner and the woman named in the indictment engaged in sexual intercourse (R. 10).

On the kidnaping indictment, the stipulated facts were that petitioner Chatwin, a widower then 68 years of age, employed as a housekeeper a girl 14 years old with the mentality of a seven year old child. He persuaded her to enter into a "celestial" marriage with him, and she subsequently became pregnant. When her parents discovered her condition they informed the juvenile authorities of the State of Utah, who took her

[3] In respect of petitioners Stubbs and Dockstader, who were jointly indicted (R. 113–114), the proof was that Stubbs transported Dockstader's "celestial" wife to Dockstader's house at his request knowing that Dockstader intended to live with her in plural marriage (R. 116–117).

into custody and caused her to be made a ward of the juvenile court. The girl eluded the authorities and went to the home of petitioners Zitting and Christensen who, together with Chatwin, convinced her that, as they put it, she should "abide by the law of God rather than the law of man" and that she was justified in running away in order to live with Chatwin. They further convinced her she ought to go to Mexico to be married to Chatwin and then remain in hiding until she reached her majority under Utah law. The three petitioners then transported the girl to Mexico by way of El Paso, Texas. She underwent a civil marriage ceremony with Chatwin in Mexico, giving her age as 18 years, and she was subsequently brought back to Arizona where she remained in hiding and lived with Chatwin under an assumed name as husband and wife until discovered by the federal authorities two years later. (R. 97–100.)

The trial judge found all the petitioners guilty as charged (R. 28, 49, 58, 77, 89–90, 102, 119, 132–133). Petitioner Cleveland, who is the defendant named in the first three indictments (Cases 895, 896 and 897), was sentenced to three years' imprisonment on each of the first two, the sentences to run concurrently, and to imprisonment for one year and one day on each of three counts of the third indictment, the sentences on this indictment to run concurrently with each other, but consecutively to the sentences imposed on the other indictments (R. 29, 50–51, 59). The other petitioners

convicted of Mann Act violations were each sentenced to three years' imprisonment (R. 78, 90, 119–120, 133). On the kidnaping charge petitioners Chatwin and Zitting were each sentenced to imprisonment for two years and petitioner Christensen to imprisonment for one year and one day (R. 102–103). On appeal, all the convictions were affirmed (R. 139–153).

## ARGUMENT

1. Petitioners contend, as we understand them, that the Mann and Kidnaping Acts cannot constitutionally be applied to their acts because they were committed in the exercise of a sincere religious belief in polygamy; that their convictions cannot be upheld without improper judicial inquiry into the verity of their religious beliefs; that the Federal Government is without power to regulate marriage; that their religious beliefs prevented the transportations from being motivated by an immoral purpose within the meaning of the Mann Act and presumably, also, removed the transportation involved in the kidnaping charge from the ambit of the Kidnaping Act because the holding of the girl involved was not for an improper purpose (Pet. 3, 5–7, 8, 16–17, 19–22).

The decisions of this Court foreclose petitioners' arguments. In cases involving the early Mormons, who, on religious grounds, entertained views on polygamy identical with those of petitioners, it was held that the guarantee of religious freedom does

not protect from punishment acts, as distinguished from beliefs, violative of a general criminal statute enacted for the protection of the morals and welfare of the community. *Davis* v. *Beason*, 133 U. S. 333; *Reynolds* v. *United States*, 98 U. S. 145, 166; see also *Mormon Church* v. *United States*, 136 U. S. 1, 50; *Baxley* v. *United States*, 134 F. 2d 937 (C. C. A. 4). Where, as here, the violator knowingly performs the criminal acts, he cannot use his religious belief to negate criminal intent. *Reynolds* v. *United States, supra*, at 167. The application of laws such as those here involved to religious polygamists cannot be regarded as a federal regulation of marriage; so far as they conflict with such relationships their impingement results only because those relationships are against the laws and mores of this country. *Davis* v. *Beason, supra; Reynolds* v. *United States, supra*. The transportation of a woman for the purpose of living with her as a mistress or concubine is transportation for an immoral purpose within the meaning of the Mann Act. "To say the contrary would shock the common understanding of what constitutes an immoral purpose when those terms are applied, as here, to sexual relations." *Caminetti* v. *United States*, 242 U. S. 470, 486. By the same token, to hold a girl for the purpose of fostering such a relationship is to hold her for the purpose of obtaining a privilege to which the kidnaper is not entitled and

therefore constitutes a holding within the meaning of the kidnaping statute. Cf. *Gooch* v. *United States*, 297 U. S. 124, 128.[4]

2. Aside from the religious motive, petitioners appear also to make the following contentions:

(a) Relying upon the decision of this Court in *Mortensen* v. *United States*, 322 U. S. 369, petitioners seem to argue that since, in each of the Mann Act cases, except the second indictment against petitioner Cleveland, which involved transportation for the purpose of entering into a "celestial marriage" relationship (see p. 5, *supra*), the evidence establishes that the woman transported was already the "celestial" wife of the petitioner, the transportation was not motivated by a purpose condemned by the Act. However, in each such instance, the stipulated facts show that the transportation was in fact for the purpose of enabling the petitioner to continue cohabitation with his

[4] Petitioners also assert (Pet. 7, 17), without supporting argument, that the Treaty of Guadalupe Hidalgo between the United States and Mexico at the close of the Mexican War bars their prosecution for acts performed in accordance with their religious beliefs. As appears from the opinion of the district court (R. 25), they apparently contend that, since Mormons had settled in the part of this country which was ceded by Mexico, they are protected by Article IX of the treaty. Obviously, they do not come within the terms of the treaty. It provided (Pet. 14) that Mexicans who did not preserve their Mexican citizenship should be incorporated into the Union and admitted at the proper time to the enjoyment of all rights of citizens of the United States, and "in the meantime" should be protected in the free exercise of their religion without restriction.

"celestial" wife. Thus, the transportation which formed the basis of the first indictment against Cleveland was a "honeymoon trip" following a "celestial" marriage (R. 1–2, 9–10), and the three counts of his third indictment were based on separate trips from Utah to Colorado for the specific purpose of taking "celestial" wives to his residence in Colorado to cohabit with him (R. 11–12, 55–56). Darger's conviction was based upon his transportation of one of his "celestial" wives from Colorado, where he had been working, to Utah, where he lived with her and his other wives (R. 65–66, 67–68). Jessop and Dockstader each maintained separate homes in different states for their legal and "celestial" wives, and the prosecution of each was based upon transportation of the "celestial" wife to the home maintained for his legal wife for the purpose of having sexual relations with the "celestial" wife (R. 85–86, 87–88, 113–114, 116–118).[5] In Petty's case, his "celestial" wife had left Utah, where she had been living with him, to visit relatives and then went to her mother's home in Idaho, where Petty also maintained a residence with his legal wife. Petty then transported his "celestial" wife back to their residence in Utah with the intent to resume their relationship, but on their arrival she refused further to cohabit with

[5] Petitioner Stubbs performed the act of transporting Dockstader's "celestial" wife (R. 117; see also footnote 3, p. 5, *supra*).

him (R. 127–128, 129–131). In each instance, therefore, the primary motive for the transportation was the continuance or resumption of sexual relations with the "celestial wife. The principle of the *Mortensen* decision is consequently inapplicable.

(b) The petitioners convicted under the Kidnaping Act (Cases 903–905) appear to question the sufficiency of the stipulated facts to establish a violation of that statute (Pet. 7–8). The facts upon which these convictions were based are set forth at pp. 5–6, *supra*. There can be no doubt, as held by the circuit court of appeals (R. 145–146), that the transportation in interstate commerce of a child who had been inveigled and persuaded to hide herself from the Utah juvenile authorities so that petitioner Chatwin might continue to cohabit with her pursuant to the illicit relationship which had arisen because of their "celestial" marriage, brought the case within the purview of the kidnaping statute. The "holding" need only be "something done with the expectation of benefit to the transgressor." *Gooch* v. *United States*, 297 U. S. 124, 128; *Miller* v. *United States*, 138 F. 2d 258 (C. C. A. 8), certiorari denied, 320 U. S. 803.*

* The indictment in the kidnaping case (R. 95–96) fails to specify the purpose of the holding. In their motion to quash, petitioners attacked the indictment generally as failing to state an offense (R. 101) but apparently did not attempt to attack its sufficiency as a pleading either in the district court or in the circuit court of appeals and do not attack it here.

## CONCLUSION

The petition for writs of certiorari presents no question requiring review by this Court, and we therefore respectfully submit that it should be denied.

CHARLES FAHY,
*Solicitor General.*
TOM C. CLARK,
*Assistant Attorney General.*
W. MARVIN SMITH,
*Special Assistant to the Attorney General.*
ROBERT S. ERDAHL,
BEATRICE ROSENBERG,
*Attorneys.*

FEBRUARY 1945.

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From their stipulation of facts, it is evident that petitioners were aware of the charge against them and the stipulation of facts, as we have shown, established an offense under the statute. Under such circumstances the indictment, if defective, was, we believe, cured by the verdict. See *Knight* v. *United States*, 137 F. 2d 940 (C. C. A. 8), where a kidnaping indictment in substantially the same form as that here involved was upheld against a motion to vacate the judgment of conviction. Cf. *Hagner* v. *United States*, 285 U. S. 427, 433.

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Nos. 23 to 28

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# In the Supreme Court of the United States

OCTOBER TERM, 1945

HIRAM KIMBALL CLEVELAND, PETITIONER

v.

THE UNITED STATES OF AMERICA

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HIRAM KIMBALL CLEVELAND, PETITIONER

v.

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DAVID BRIGHAM HARDER, PETITIONER

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VERNEL V. JESSUP, PETITIONER

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FOLLIS GARDNER PETTY, PETITIONER

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*WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES**

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# In the Supreme Court of the United States

OCTOBER TERM, 1945

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No. 23

HEBER KIMBALL CLEVELAND, PETITIONER

*v.*

THE UNITED STATES OF AMERICA

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No. 24

HEBER KIMBALL CLEVELAND, PETITIONER

*v.*

THE UNITED STATES OF AMERICA

---

No. 25

HEBER KIMBALL CLEVELAND, PETITIONER

*v.*

THE UNITED STATES OF AMERICA

---

No. 26

DAVID BRIGHAM DARGER, PETITIONER

*v.*

THE UNITED STATES OF AMERICA

No. 27

VERGEL Y. JESSOP, PETITIONER

*v.*

THE UNITED STATES OF AMERICA

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No. 28

THERAL RAY DOCKSTADER, PETITIONER

*v.*

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L. R. STUBBS, PETITIONER

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No. 30

FOLLIS GARDNER PETTY, PETITIONER

*v.*

THE UNITED STATES OF AMERICA

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No. 31

WILLIAM CHATWIN, PETITIONER

*v.*

THE UNITED STATES OF AMERICA

No. 32

CHARLES F. ZITTING, PETITIONER

*v.*

THE UNITED STATES OF AMERICA

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No. 33

EDNA CHRISTENSEN, PETITIONER

*v.*

THE UNITED STATES OF AMERICA

---

*ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT*

---

# BRIEF FOR THE UNITED STATES

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## OPINIONS BELOW

The opinion of the circuit court of appeals (R. 116–123) is reported at 146 F. 2d 730. The opinion of the district court (R. 13–25) is reported at 56 F. Supp. 890.

## JURISDICTION

The judgments of the circuit court of appeals were entered January 4, 1945 (R. 123–128). The petition for writs of certiorari was filed January 30, 1945, and the writs were granted March 12, 1945 (R. 129–134). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13,

1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. (a) Whether a professed religious belief in polygamy absolves petitioners from prosecution under the Mann Act.

(b) Whether the dominant purpose of the transportations involved was sexual relations within the purview of the Mann Act and the decision of this Court in *Mortensen* v. *United States*, 322 U. S. 369.

2. Whether the facts in Cases Nos. 31–33 establish a violation of the Federal Kidnaping Act.

STATUTES INVOLVED

Section 2 of the Act of June 25, 1910, c. 395, 36 Stat. 825 (18 U. S. C. 398), known as the Mann Act, provides in part:

> SEC. 2. Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, * * * any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; * * * shall be deemed guilty of a felony, and upon conviction

thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

The Federal Kidnaping Act of June 22, 1932, c. 271, 47 Stat. 327, as amended by the Act of May 18, 1934, c. 301, 48 Stat. 781 (18 U. S. C. 408a), provides in pertinent part as follows:

SEC. 1. Whoever shall knowingly transport or cause to be transported, or aid or abet in transporting, in interstate or foreign commerce, any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away by any means whatsoever and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall, upon conviction, be punished (1) by death if the verdict of the jury shall so recommend, provided that the sentence of death shall not be imposed by the court if, prior to its imposition, the kidnaped person has been liberated unharmed, or (2) if the death penalty shall not apply nor be imposed the convicted person shall be punished by imprisonment in the penitentiary for such term of years as the court in its discretion shall determine: * * *

## STATEMENT

Seven indictments charging violations of the Mann Act, and one charging a violation of the

Federal Kidnaping Act were returned against petitioners in the United States District Court for the District of Utah (R. 1, 40–41, 46–48, 54–55, 70, 78–79, 94–95, 106–107). Petitioners are all members of the Fundamentalist cult, which sanctions plural, or as they call it, "celestial" marriage (R. 7, 11, 56, 72, 81, 82, 98–99, 109).[1] Each of them waived the right to a jury and consented to the trial of his case by the court on a stipulation of facts entered into by his counsel (R. 7, 11–12, 41, 48, 55–56, 71, 80, 96–97, 107–108).

THE MANN ACT CASES (NOS. 23–30)

Each of the Mann Act indictments charges the petitioner named therein with having transported a woman in interstate commerce for the immoral purpose of having her act as a mistress or concubine, and all, except the indictments in cases Nos. 26 and 30, also charge that the transportation was for the purpose of debauchery (R. 1, 40–41, 46–48, 54–55, 70, 94–95, 106–107). The first two indictments against petitioner Cleveland also

[1] In the stipulations of fact a "celestial" marriage is defined as a "religious ceremony according to the beliefs" of the Fundamentalists, but contrary to State law. (See R. 7, 56). It is thus used in the sense of a plural or illegal marriage. The term should not be confused with the doctrine of the Mormon Church that a marriage performed by a member of the priesthood of that church is "for time and eternity," i. e., to last beyond death. See *Hilton* v. *Roylance*, 25 Utah 129, 145–149 (1902); *Toncray* v. *Budge*, 14 Idaho 621, 647–656 (1908). Since 1890 the Mormon Church has forbidden plural marriages. *Toncray* v. *Budge*, *supra*.

specify that the transportation was for the immoral purpose of having sexual intercourse with a woman not the wife of the petitioner (R. 1, 40–41). The stipulated facts in each such case may be summarized as follows:

*Nos. 23–25.*—In 1941 petitioner Cleveland was legally married to Zola Chatwin and was cohabiting with Marie Beth Barlow with whom he had entered into a plural cult marriage when she was fourteen years of age. Marie Barlow was taken into custody by Utah juvenile authorities after the birth of a child she bore petitioner in December 1941. She was released upon condition that she have no further connection with petitioner. In order to evade the ruling of the court, petitioner secreted her for a time in a tourist camp at Salt Lake City. (R. 7–8.)

In August of 1941, while visiting a friend at a hospital, petitioner became acquainted with Kathryn Collinwood, twenty-one years old, in training as a nurse. In the next two days, during which petitioner spent considerable time with Miss Collinwood, he discussed plural marriage with her. On the second day after their meeting they went through the form of a plural cult marriage, and thereafter engaged in sexual intercourse. Petitioner had promised Miss Collinwood a "honeymoon" trip, and several months after the cult ceremony had been performed they went from Utah to Evanston, Wyoming, where

petitioner had engaged a room in a hotel. They engaged in sexual relations during the day and night. The next day they returned to Salt Lake City. (R. 8–9.) This trip forms the basis of the indictment in No. 23 (R. 1).

In early 1942, Miss Collinwood arranged a "date" for petitioner with one Marcia Covington, seventeen years of age. One evening in April, after petitioner and Miss Covington had spent some time drinking wine, she consented to enter into a plural marriage with petitioner. They went to Saint George, Utah, to have a cult marraige performed, but could not locate the member of the cult who was to perform the ceremony. They agreed to go to California and have the ceremony performed there. They entered into a cult marriage in California and spent the night in an automobile tourist cabin where they engaged in sexual intercourse. The next day Miss Covington refused to go further with the plural marriage. (R. 9.) The transportation of Miss Covington from Utah to California is the basis of the indictment in No. 24 (R. 40–41).

In June 1942 the leaders of the cult decided that Kathryn Collinwood should be taken out of Utah because she was being investigated by the authorities for practicing obstetrics without a license. Petitioner and Miss Collinwood went to Grand Junction, Colorado, where petitioner obtained employment. In August petitioner told her

that he was going to Salt Lake City to bring back Marie Barlow "so that she might become pregnant." He transported Marie Barlow from Salt Lake City to Colorado and there engaged in sexual intercourse with her. Miss Barlow remained in Grand Junction for a time and petitioner alternately cohabited with her and with Miss Collinwood. Sometime later Marie Barlow returned to Salt Lake City. She did not become pregnant, and in October, petitioner again brought her from Salt Lake City to Grand Junction for the express purpose of having her become pregnant. He cohabited with her in Grand Junction for several months. Kathryn Collinwood had in the meantime returned to Salt Lake City. Petitioner sent her money to enable her to return to Colorado by train. She did so, and thereafter resumed sexual relations with petitioner. At Grand Junction petitioner would alternate living with his plural wives, introducing them as sisters-in-law, or other relatives. (R. 10–11.) The three counts of the indictment in No. 25 are based on the two transportations of Marie Barlow and the return of Kathryn Collinwood from Salt Lake City, Utah, to Grand Junction, Colorado (R. 46–48).

In April 1943, petitioner's legal wife divorced him in order to enable him to marry Marie Barlow, but petitioner's former wife continued to live with him in plural marriage. Petitioner married Miss Barlow in Evanston, Wyoming, a few days

after his divorce. Five months later she gave birth to her second child by petitioner, she being at that time approximately sixteen years old. (R. 7, 8.)

*No. 26.*—Petitioner Darger had one legal and two plural wives. He was living with one of his plural wives, Jean Barlow, in Grand Junction, Colorado, where he had been working as a contractor. In July 1942, he transported her from Colorado to Salt Lake City, Utah, where he lived with her and his other wives in a state of plural marriage. Thereafter Darger returned to Colorado for a short period and then came back to Salt Lake City where he continued to live with Miss Barlow and his other wives. (R. 56–57.)

*No. 27.*—Petitioner Jessop and his legal wife employed Mae Johnson, then fifteen years old, as a housemaid. Jessop courted Mae Johnson openly before his wife and nine children, causing some domestic difficulties. He persuaded her to enter into a plural marriage with him in 1941, and later established a home for her in Short Creek, Utah, two miles away from his home in Short Creek, Arizona. In April 1943, she had a child by petitioner. In July 1943, when his legal wife temporarily left their home, petitioner, who remained at home with his children, immediately transported Mae Johnson from Short Creek, Utah, to Short Creek, Arizona, and there cohabited with her for about a week. His children witnessed petitioner in bed with Mae Johnson. (R. 72–73.)

*Nos. 28–29.*—Petitioner Dockstader maintained two households, one with his legal wife in Short Creek, Arizona, and one with his plural wife in Salt Lake City, Utah. In July 1943, Dockstader arranged to have petitioner Stubbs move his plural wife and her furniture from Utah to his home in Arizona where he was to live in plural marriage with the two women. At the time Stubbs moved the plural wife he knew that the purpose of the transportation was to enable Dockstader to live in plural marriage with both women. (R. 97–98.)

*No. 30.*—In 1934, petitioner Petty, living with his legal wife in Pocatello, Idaho, became acquainted with Mary Ford, a crippled woman. He paid considerable attention to her, and petitioner's legal wife proposed plural marriage to her on petitioner's behalf. After a period of argument and discussion, Miss Ford entered into a plural cult marriage with petitioner. For a time she remained at home with her mother, but regularly engaged in sexual intercourse with petitioner in the absence of his legal wife at his apartment and in a small building at the rear of the apartment which was used for the storing of furniture. She had three children by him, one of whom died. Early in 1943 petitioner established a home for Miss Ford in Providence, Utah, and commuted between that place and the home he maintained with his legal wife in Pocatello, Idaho, living with the two women alternately. In July,

1943, he consented to have Miss Ford visit relatives in Idaho. After her visit she went to her mother's home in Pocatello, Idaho, and, through her mother, communicated with petitioner. Petitioner transported her from Pocatello to her living quarters in Providence, Utah. Upon his arrival, he proposed sexual relations to her, but she refused. A few weeks later petitioner came back to Providence and forcibly attempted to have sexual relations with Miss Ford, and desisting from the struggle that ensued only when he heard someone on the front porch of their house. Petitioner then informed Miss Ford that if that was her attitude he had no obligation further to support the children. Thereafter he gave Miss Ford only five dollars and she was forced to rely solely on public relief for her sustenance. (R. 108–110.)

THE KIDNAPING ACT CASES (NOS. 31–33)

The Kidnaping Act indictment charges that petitioners Chatwin, Zitting, and Christensen unlawfully inveigled, decoyed, carried away, and held a minor child, age fifteen, for a certain period and, knowing her to have been so inveigled and held, transported her from Utah, by way of El Paso, Texas, to Short Creek, Arizona (R. 78–79).

The stipulated facts are that in August 1940, Chatwin, a widower, then sixty-eight years of age and living with one Lulu Cook, employed as a

housekeeper in his home in Santaquin, Utah, Dorothy Wyler, a girl fourteen years old, with the mentality of a seven year old child. While living in Chatwin's home she was continually taught by Chatwin and Lulu Cook that plural marriage was essential to her salvation, and that it was her grandmother's desire that Chatwin should take her in plural marriage. She was persuaded to enter into a cult marriage with Chatwin, and she subsequently became pregnant. When her parents discovered her condition, they informed the juvenile authorities of the State of Utah, who took her into custody on August 4, 1941, and caused her to be made a ward of the juvenile court. On August 10, 1941, the girl eluded the authorities and was given money by two daughters of Chatwin to go to Salt Lake City. There she went to the home of Darger, one of the petitioners in the Mann Act cases. From there she was taken to the home of petitioners Zitting and Christensen. They, together with Chatwin, convinced her that, as they put it, she should "abide by the law of God rather than the law of man," and that she was perfectly justified in running away from the juvenile court in order to live with Chatwin. They further convinced her that she should go to Mexico to be married to Chatwin, and then remain in hiding until she reached her majority under Utah law. In October, the three petitioners transported the girl to Mexico, by way of El Paso, Texas. She

went through a civil marriage ceremony with Chatwin in Mexico, giving her age as eighteen years, and was subsequently brought back to Short Creek, Arizona, where she remained in hiding and where she lived with Chatwin under assumed names, until discovered by federal authorities two years later. (R. 80–84.) While in Short Creek she gave birth to two children by Chatwin. The transportation of the girl was without the consent and against the wishes of her parents and without authority from the Utah Juvenile Court.[2]

All the petitioners were found guilty as charged (R. 25, 42, 49, 65, 74, 85, 99–100, 111). Petitioner Cleveland was sentenced to imprisonment for three years on each of the first two indictments returned against him, the sentences to run concurrently, and to imprisonment for one year and one day on each of the three counts of the third indictment, the sentences on this indictment to run concurrently with each other, but consecutively to the sentences imposed on the other indictments (R. 26–27, 43, 50–51). The other petitioners named in the Mann Act indictments were each sentenced to imprisonment for three years (R. 66, 75, 101–102, 112–113). On the kidnaping charge, Chatwin and Zitting were each sen-

[2] See *Chatwin* v. *Terry*, 153 P. 2d 941 (Utah, 1944), in which the Utah Supreme Court held that the juvenile court had authority to hold the girl in custody until she reached the age of twenty-one, despite her marriage to Chatwin.

tenced to imprisonment for two years, and Christensen to imprisonment for one year and one day (R. 86–88). On appeal, the judgments as to all the petitioners were affirmed (R. 123–128).

## SUMMARY OF ARGUMENT

1. *The Mann Act Cases.*—In *Caminetti* v. *United States,* 242 U. S. 470, this Court decided that transportation of a woman for the purpose of having her act as a mistress or concubine is transportation for an immoral purpose within the meaning of the Mann Act. Since the women transported fell within that status, petitioners' professed religious belief in polygamy does not absolve them from criminal liability. *Reynolds* v. *United States,* 98 U. S. 145, 167. The decision of this Court in *Mortensen* v. *United States,* 322 U. S. 369, is inapplicable, for, in each instance, the purpose to establish or continue sexual relations was the dominant cause for the transportation of the woman named in the indictment.

2. *The Kidnaping Act Cases.*—Petitioners' act in persuading a young child of extremely low mentality to avoid the lawful custody of the Utah Juvenile Court and of her parents, and to remain with petitioners in order to cohabit with one of them, was an inveiglement and a holding "for ransom, reward, or otherwise," within the meaning of the Federal Kidnaping Act. The moment the child was transported across state lines the federal offense was completed.

## ARGUMENT

### I

### THE EVIDENCE ESTABLISHES VIOLATIONS OF THE MANN ACT AS THAT STATUTE HAS BEEN CONSTRUED BY THIS COURT

a. *The scope of the statute.*—Almost thirty years ago, in *Caminetti* v. *United States,* 242 U. S. 470, this Court decided that the interstate transportation of a woman for the purpose of living with her as a mistress or concubine is transportation for an immoral purpose within the meaning of the Mann Act; that pecuniary gain, either as a motive for the transportation or an attendant of its object, is not an element of the offense defined. The arguments for and against such an interpretation of the statute are marshalled in the majority and dissenting opinions in that case, and no purpose would be served by repeating them here.[3] The significant fact, we think, is

[3] It may be noted that the majority opinion in the *Caminetti* case understated the facts when it said that the former decision in *United States* v. *Bitty,* 208 U. S. 393, "must be presumed to have been known to Congress" when it enacted the Mann Act (242 U. S. at pp. 487–488). The holding of the *Bitty* case—that the phrase "any other immoral purpose," as used in the Act of February 20, 1907, penalizing the importation of any alien woman for the purpose of prostitution and any other immoral purpose, includes a purpose to have the woman live as a concubine—was specifically mentioned in both the Senate and House Reports on the Mann Act (61st Cong., 2d sess., S. Rep. 886, p. 4; H. Rep. 47, p. 7). The statement in the reports that "this

that, in the more than a quarter of a century that has elapsed since that decision, it has been accorded unquestioned acceptance by Congress.

The only congressional attention given to the *Caminetti* case was in its initial stage, when an order from the then Attorney General to postpone the trial of the defendants for several months results in vigorous protests on the part of certain members of Congress (see 50 Cong. Rec. 2532, 2874–2900, 3006–3023), with Representative Mann, the author of the Act, among the leaders of the group seeking to condemn the Attorney General (50 Cong. Rec. 2875, 2879–2880, 2884, 3006). We have found only two bills introduced which were designed to circumscribe the effect of that decision, and both such bills died in committee (see S. 2438, 73d Cong., 2d sess., introduced January 1934, and S. 101, 75th Cong., 1st sess., introduced January 1937).[5]

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decision is not pertinent to the phase of the subject under discussion, and is mentioned only in passing" does not detract from the force of the *Bitty* case as an interpretation of the phrase "other immoral purpose," for that portion of the reports was concerned with the provisions of the former Act punishing the harboring of alien prostitutes, and the reports explained the manner in which Section 6 of the Mann Act avoided the constitutional infirmities of the earlier section.

[5] S. 2438 is representative. It sought to add a section providing that "Sections 2 and 3 of this Act shall not be construed to apply to any act prohibited by such Sections, if such act is done with the consent of the woman or girl, and without gain, pecuniary or otherwise, to such woman or girl or other person doing such act."

During the same period, there has been an unbroken line of judicial decisions which have followed the *Caminetti* ruling. It was recognized by implication in the decision of this Court in *Gebardi* v. *United States*, 287 U. S. 112, 120, and has been consistently applied by the various circuit courts of appeals.[5] Recently, in *United States* v. *Reginelli*, 133 F. 2d 595 (C. C. A. 3), this Court was specifically asked to reconsider its decision in the *Caminetti* case, but declined to do so. No. 767, October Term, 1942, certiorari denied, 318 U. S. 783.

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[5] *United States* v. *Reginelli*, 133 F. 2d 595 (C. C. A. 3), certiorari denied, 318 U. S. 783; *Tilghman* v. *United States*, 146 F. 2d 644 (C. C. A. 5); *Qualls* v. *United States*, decided July 5, 1945 (C. C. A. 5); *Elrod* v. *United States*, 266 Fed. 55 (C. C. A. 6); *Blackstock* v. *United States*, 261 Fed. 150 (C. C. A. 8), certiorari denied, 254 U. S. 634; *Carey* v. *United States*, 265 Fed. 515 (C. C. A. 8); *Christian* v. *United States*, 28 F. 2d 114 (C. C. A. 8); *Neff* v. *United States*, 105 F. 2d 688 (C. C. A. 8); *Poindexter* v. *United States*, 139 F. 2d 158 (C. C. A. 8); *Corbett* v. *United States*, 299 Fed. 27 (C. C. A. 9); *Tobias* v. *United States*, 2 F. 2d 361 (C. C. A. 9), certiorari denied, 267 U. S. 593; *Hart* v. *United States*, 11 F. 2d 499 (C. C. A. 9), certiorari denied, 273 U. S. 694; *Ghadiali* v. *United States*, 17 F. 2d 236 (C. C. A. 9), certiorari denied, 274 U. S. 747; *Rockwell* v. *United States*, 111 F. 2d 452 (C. C. A. 9); *Burgess* v. *United States*, 294 Fed. 1002 (App. D. C.).

Most of these cases, like the *Caminetti* case itself, involved situations in which there was consent on the part of the woman as well as absence of a commercial motive. It is firmly established that lack of consent on the part of the woman transported, whether for the purpose of prostitution or other forms of immorality, is not an element of the offense under Section 2 of the Mann Act. *Gebardi* v. *United States*, 287 U. S. 112, 121; *United States* v. *Holte*, 236 U. S. 140, 145.

Under the circumstances, we think that Congress must be deemed to have acquiesced in the interpretation of the Mann Act laid down by this Court in the *Caminetti* decision, and that, if there is to be a change in the scope of the statute, it should come from the legislature and not from the courts. As this Court stated in *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 488–489:

> * * * The long time failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one. This is the more so where, as here, the application of the statute * * * has brought forth sharply conflicting views both on the Court and in Congress, and where after the matter has been fully brought to the attention of the public and the Congress, the latter has not seen fit to change the statute.

See also *United States* v. *Elgin J. & E. Ry.*, 298 U. S. 492, 500; *Missouri* v. *Ross*, 299 U. S. 72, 75; *United States* v. *Ryan*, 284 U. S. 167, 175; *Beale* v. *United States*, 71 F. 2d 737, 739 (C. C. A. 8).

b. *The federal power to punish interstate transportation for the purpose of having sexual relations with a plural wife.* Petitioners' contention that, as applied to the facts of these cases, the Mann Act amounts to a federal regu-

lation of the marriage relationship (Br. 2, 10–11, 18–19, 39) is no different from previous attacks on the constitutionality of the Act as interfering with the police powers of the state—an argument which was rejected by this Court in *Hoke* v. *United States*, 227 U. S. 308, 321–323; *Athanasaw* v. *United States*, 227 U. S. 326, 328; *Wilson* v. *United States*, 232 U. S. 563, 567; and *Caminetti* v. *United States*, 242 U. S. 470, 491. The Act is no more a federal regulation of marriage than it is a federal regulation of prostitution or other immorality. Such matters are all within the exclusive province of the states. However, the Federal Government constitutionally may, and by the Mann Act does, bar the use of instrumentalities of interstate commerce as a means of effectuating improper objectives, whether such purpose be commercialized vice or noncommercial sexual immorality.

We discuss below the question whether the particular transportation charged in each indictment was so motivated by a purpose condemned by the Act as to constitute a federal crime. Here, it is sufficient to note that, in general, the stipulated facts in these cases show that petitioners made extensive use of interstate transportation in the course of their activities. Several of the petitioners kept legal wives in one state and plural wives in another, and moved these plural wives from state to state, sometimes for short periods, thus rendering state prosecutions difficult. Their

activities were extended into four states—Arizona, Colorado, Idaho, Utah. It is thus evident that petitioners' conduct was not wholly a local issue, of concern to state authorities alone, but that, in fact as well as in law, it presented a federal problem.

c. *Criminal intent.*—Since the Mann Act prohibits the interstate transportation of a woman for the purpose of having improper sexual relations with her, petitioners' professed religious belief in polygamy does not absolve them from criminal liability under the Act. Petitioners argue (Br. 2, 4–5, 7–18, 31–32, 34–35, 37–39, 41, 53–54) that polygamy is merely illegal and not immoral; that it cannot be immoral because it is based on a religious belief. Manifestly, however, the definition of "immoral purpose," as used in the Act, does not depend upon each individual's own standard of morality, but "upon the common understanding of what constitutes an immoral purpose when those terms are applied, as here, to sexual relations." *Caminetti* v. *United States*, 242 U. S. 470, 486.* If petitioners' construction of the statute were correct, any defendant in a Mann Act prosecution

* "Immoral purpose," as used in the Mann Act, is limited to sexual immorality (*Athanasaw* v. *United States*, 227 U. S. 326); hence, petitioners' illustrations (Br. 7, 24) of the possible scope of the statute if it should be applied to everything forbidden by state statute, as, for example, transportation for the purpose of illegally obtaining cigarettes, liquor, etc., are inapt.

would be free to defend on the ground that, according to his own concepts of morality, religious or otherwise, his acts were not immoral. The court and jury would then, indeed, be required to determine the religio-philosophical questions which petitioners raise (Br. 7–11) as to whether particular acts are immoral in the sense that they represent deviations from a person's own standard of ethics. Clearly, the words "immoral purpose," as used in the Mann Act, were not intended to have any such amorphous, personalized connotation, but were predicated upon the generally accepted standard of sexual morality of this country.

The purpose to live in a polygamous relationship is an immoral purpose under the laws and mores of this country, as repugnant to our concepts of morality as the acts condemned in the *Caminetti* case. It is not less so when attempted to be justified on religious grounds. *Reynolds* v. *United States,* 98 U. S. 145, 163–166; *Davis* v. *Beason,* 133 U. S. 333, 345; *Mormon Church* v. *United States,* 136 U. S. 1, 48–50. The fact that petitioners called the women they transported "wives" and supported them does not make them wives in the accepted concept of the word. Whatever petitioners may profess to believe, these women were mistresses or concubines in the common understanding of those terms. Transportation of a woman for the purpose of having her live in polygamy is, therefore, transportation of

a woman for the purpose of having her live as a mistress or concubine and, hence, within the coverage of the Mann Act as interpreted by this Court in the *Caminetti* case.

If the desire to have sexual relations was the dominant motive for the transportation (*Mortensen* v. *United States,* 322 U. S. 369), a question we discuss below, it is clear that each of petitioners intended to and did perform the very act which the statute forbids—the transportation of a woman for the purpose of having improper sexual relations with her. They thus necessarily had the intent to violate the Mann Act. As this Court stated in *Reynolds* v. *United States,* 98 U. S. 145, 167: "Every act necessary to constitute the crime was knowingly done, and the crime was therefore knowingly committed." Petitioners are free to believe any doctrine; they are not free to act in a manner contrary to the laws of this country. For, as this Court stated in *Cantwell* v. *Connecticut,* 310 U. S. 296, 303–304: "the [first] Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be." See also *Chaplinsky* v. *New Hampshire,* 315 U. S. 568; *Murdock* v. *Pennsylvania,* 319 U. S. 105, 109–110. This distinction is best illustrated by the decisions of this Court in the *Reynolds* and *Beason* cases, *supra,* in which the Court rejected the contentions of the early Mormons that certain

Utah territorial statutes directed against bigamy and polygamy violated the guarantee of religious freedom. While petitioners cannot be prosecuted for believing in polygamy, they may be prosecuted under state law for practicing polygamy (*State* v. *Barlow,* 153 P. 2d 647 (Utah, 1944), certiorari denied upon the authority of the *Reynolds* and *Beason* cases, April 2, 1945, No. 1037, October Term, 1944), and, under federal law, we submit, for transporting a woman for the immoral purpose of having her live as a mistress or concubine in a polygamous relationship.

d. *Motive of the transportation.*—Relying upon the principle enunciated by this Court in *Mortensen* v. *United States,* 322 U. S. 369, petitioners argue (Br. 20–23, 32–33, 36, 40–41, 42–44, 46, 48) that since, in each of the Mann Act cases except the second indictment against petitioner Cleveland, the evidence establishes that the woman transported was already the plural wife of a petitioner, the transportation was not motivated by the purpose condemned by the Act. However, in each instance, the stipulated facts establish that the transportation was in fact "the use of interstate commerce as a calculated means for effectuating sexual immorality." See 322 U. S. at p. 375.

The second indictment against Cleveland, based upon interstate transportation for the purpose of entering into a plural marriage to be followed by sexual relations, manifestly falls outside the

scope of the *Mortensen* decision. The trip had no other purpose than to furnish the excuse for the sexual immorality which occurred. After petitioner and Miss Covington had spent the night together, she refused to continue the plural marriage relationship (R. 9). Since, however, it is evident that when petitioner transported her to California he intended to make her his plural wife, her subsequent repudiation in no way alters the fact that the transportation was for the immoral purpose of having her act as a mistress and concubine, as well as for the improper purpose of having illicit sexual relations with her. The purpose which motivates the transportation, not the accomplishment of such purpose, is the decisive factor in determining guilt under the Mann Act. *Wilson* v. *United States,* 232 U. S. 563, 570–571. Moreover, inasmuch as the purpose of the transportation was the seduction of Miss Covington from virtue by illicit sexual intercourse, the transportation was for the purpose of debauchery under the act, a purpose charged in the indictment (R. 40). See *Van Pelt* v. *United States,* 240 Fed. 346, 348 (C. C. A. 4); *Johnson* v. *United States,* 215 Fed. 679, 683 (C. C. A. 7).

It is also clear that the interstate transportation of Marie Barlow, on which the first count of the third indictment against Cleveland was based, was motivated solely by the purpose to have sexual intercourse, for petitioner announced that

he was bringing Miss Barlow from Utah to Colorado to have her become pregnant, and he sent her back after she had cohabited with him for a short time. (See p. 9, *supra.*) These facts support the aggregate sentence of petitioner Cleveland, in view of the corresponding concurrent sentences imposed on the other indictment and the other counts of the third indictment returned against him (see p. 14, *supra.*). *Hirabayashi* v. *United States,* 320 U. S. 81, 105.

In Nos. 27–29 (*supra,* pp. 10–11), where a plural wife was moved to a home maintained by petitioners Jessop and Dockstader, respectively, for their legal wives, the trier of fact was clearly entitled to conclude that the dominant motive for the transportation was the purpose to have sexual relations with the plural wife, and that she would not have been moved but for such purpose. It is irrelevant that these two petitioners, having already established a polygamous relationship, might have maintained sexual relations with their plural wives in some other place without the interstate journeys. The significant fact is that, in order to cohabit with the plural wives, petitioners found it necessary or convenient to transport them in interstate commerce. Such interstate transportation was therefore the means of effectuating the immoral purpose. Petitioner Stubbs knowingly aided and abetted Dockstader in such purpose (*supra,* p. 11), and thus is liable as a

principal. (Section 332 of the Criminal Code, 18 U. S. C. 550.)

In No. 26 (*supra*, p. 10), it may be that petitioner Darger returned to Utah from Colorado because he had completed his work in Colorado. His guilt under the Mann Act depends, however, not on his motive in transporting himself, but on his motive in transporting his plural wife. *Elrod* v. *United States*, 266 Fed. 55, 57 (C. C. A. 6); *Cohen* v. *United States*, 120 F. 2d 139 (C. C. A. 5). It is a fair inference from the evidence that he brought his plural wife back with him in order to continue cohabitation with her. The interstate transportation was thus a means of effecting sexual immorality, and hence a crime under the Act.

Similarly, in No. 30, the plural wife, Miss Ford, was undoubtedly motivated by a desire to return from Idaho to her home in Utah (*supra*, pp. 11–12). But her purpose in undertaking the interstate journey is immaterial. *Hart* v. *United States*, 11 F. 2d 499 (C. C. A. 9), certiorari denied, 273 U. S. 694; *Mallory* v. *United States*, 126 F. 2d 192 (C. C. A. 9); *Qualls* v. *United States*, decided July 5, 1945 (C. C. A. 5). The material fact is petitioner Petty's purpose in transporting her to her home. His action in proposing sexual relations immediately upon their arrival in Utah, and his subsequent abandonment of Miss Ford after she refused to cohabit with

him, justify the conclusion that he transported her from Idaho to Utah primarily because he expected to engage in sexual relations with her as a result of the transportation; that he would not have brought her to her living quarters had he known of her intention not to cohabit with him. He was thus motivated by an immoral purpose within the purview of the Mann Act.

Thus, in each case, the immoral purpose was not merely incidental to, but was the dominant motive of, the interstate transportation of the woman named in the indictment and the transportation facilitated the accomplishment of that purpose. It is unimportant that the immoral relationship may have been established prior to the interstate journey. If the operator of a house of prostitution who decided to move his establishment from one state to another transported the girls employed by him, it surely could not be contended that, because the girls had previously been prostitutes, the transportation was not for the purpose of prostitution. So here, the fact that, in most instances, petitioners had previously had sexual relations with their plural wives does not preclude a finding that the purpose to have sexual relations was the motive for the particular interstate transportation charged in the indictment. Since, as we have shown, it was in fact the dominant motive, the principle of the *Mortensen* case is inapplicable.

## II

### THE EVIDENCE IN CASES 31–33 ESTABLISHES A VIOLATION OF THE FEDERAL KIDNAPING ACT

The Federal Kidnaping Act punishes the transportation in interstate commerce of "any person who shall have been unlawfully * * * inveigled, decoyed * * * and held for ransom or reward or otherwise." We submit that the stipulated facts establish that the child named as the victim was both "unlawfully inveigled and decoyed" and "held for ransom or reward or otherwise."

These cases do not present merely the situation of an elopement with a minor. Petitioners induced a child 15 years old, with the mental age of 7 years, whom they knew to be a ward of the court, to remain in their custody rather than in the custody of her parents and the court. In view of the child's tender years and extremely low mentality, there was ample warrant for the trial judge to conclude that the girl was incapable of understanding the full significance of petitioners' importunities. Their inducement thus falls within the dictionary definition of "inveigle," as "to lead on or astray by blinding," or "to entice by cajoling." Webster's *International Dictionary*. See also *In re Kelly*, 46 Fed. 653, 655 (D. Ore.); *Gould* v. *State*, 71 Neb. 651, 656 (1904); *Arrington* v. *State*, 3 Ga. App. 30 (1907); *State* v. *Rivers*, 84 Vt. 154, 157 (1911).

It is also clear that the child was held for the purpose of enabling petitioner Chatwin to cohabit with her. This was a holding for "ransom or reward or otherwise" within the meaning of the statute. In *Gooch* v. *United States*, 297 U. S. 124, 128, this Court decided that the words "or otherwise" were not limited to pecuniary profits but extended to a holding for any purpose that might secure some benefit to the transgressor. See also *United States* v. *Parker*, 103 F. 2d 857, 861 (C. C. A. 3), certiorari denied, 307 U. S. 642; *Miller* v. *United States*, 138 F. 2d 258 (C. C. A. 8), certiorari denied, 320 U. S. 803. The Kidnaping Act has been applied to a situation where the purpose of the holding was sexual intercourse. *Poindexter* v. *United States*, 139 F. 2d 158 (C. C. A. 8).[7]

[7] As we pointed out in our brief in opposition (Nos. 895-905, October Term 1944, p. 11), the indictment in this case failed to specify the purpose of the holding. In their motion to quash, petitioners attacked the indictment generally as failing to state an offense (R. 84), but did not attack its sufficiency as a pleading in the district court, in the circuit court of appeals, or in the petition for a writ of certiorari. They now, for the first time, raise the point that the indictment was insufficient for failure to allege the purpose of the holding (Br. 55-56). From their stipulation of facts it is evident that petitioners were aware of the charge against them, and, as we have shown, the facts stipulated establish an offense under the statute. Under such circumstances, the indictment, if defective, was, we submit, cured by the verdict. See *Knight* v. *United States*, 137 F. 2d 940 (C. C. A. 8), where a kidnaping indictment in substantially the same form was upheld against a motion to vacate the judgment of conviction. See also *Knight* v. *Hudspeth*, 112 F. 2d 137, 139

That Chatwin ultimately married the child in Mexico does not, we think, absolve petitioners from liability under the Kidnaping Act. The child had been withheld from her parents and from the Utah juvenile authorities for almost two months before the trip to Mexico and back to Arizona was undertaken, and presumably had been cohabiting with Chatwin during that period. The kidnaping, i. e., the inveigling and holding for ransom, reward, or otherwise had, therefore, already taken place before the start of the interstate journey, and the transportation of the child so kidnaped was an offense under federal law as soon as state lines were crossed. As in the Mann Act cases, *supra*, petitioners' professed religious beliefs do not absolve them from liability for their deliberate acts in violation of a federal statute.[8]

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(C. C. A. 10), certiorari denied, 311 U. S. 681; cf. *Hagner* v. *United States*, 285 U. S. 427, 433.

[8] Each of the petitioners moved to quash the indictment returned against him and submitted an affidavit in which he alleged on information and belief that the prosecution was instigated by the leaders of the dominant Mormon Church, who were opposed to petitioners' sect, that the foreman of the grand jury was not qualified to sit because he was a member of the high priesthood of the church, and that most, if not all, of the members of the grand jury were influential members of the Mormon Church. The only specific fact set forth in each such affidavit was a declaration of the General Conference of the Mormon Church in 1931, thirteen years before the return of the indictment, that the leaders of the church were willing to give "such legal assistance as we legitimately can" in the criminal prosecution of persons who live in plural marriage (R. 2–6, 57–63, 73, 84, 99, 110). The district court in its opinion stated that the motions to quash

## CONCLUSION

The judgments below should be affirmed.

HAROLD JUDSON,
*Acting Solicitor General.*
THERON L. CAUDLE,
*Assistant Attorney General.*
W. MARVIN SMITH,
*Special Assistant to the Attorney General.*
ROBERT S. ERDAHL,
BEATRICE ROSENBERG,
*Attorneys.*

OCTOBER 1945.

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had been overruled on the ground that "there was no evidence or proof before the Court that there was any bias or prejudice or irregularities in the action of the Grand Jury upon which the Court could presume to act in the premises, other than an allegation that the foreman of said jury was a member of a different sect of which the defendants were alleged to be adherent, which was considered insufficient to sustain the motion in the absence of any affirmative showing that the foreman of the grand jury personally entertained views antagonistic to the defendants or, even if he did, that there was no showing as to any bias or prejudice on the part of any of the other members of the grand jury returning said indictments." (R. 14.) The circuit court of appeals held that petitioners' "motions and *ex parte* affidavits, alone and without more, were not enough to warrant the quashing" of the indictments (R. 119). The decisions below on this point, which petitioners challenge (Br. 28–30), are clearly correct. It is well established that the burden of proving discrimination or prejudice is on the challenger (*Akins* v. *State of Texas*, No. 853, October Term 1944, decided June 4, 1945), and that "it is incumbent on the moving party to introduce, or to offer, distinct evidence in support of the motion; the formal affidavit alone, even though uncontroverted, is not enough." *Glasser* v. *United States*, 315 U. S. 60, 87, and cases cited. The record is barren of any evidence presented or offered by petitioners to support their vague charges made on information and belief.

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DEC 9 1946

# SUPREME COURT OF THE UNITED STATES

Nos. 12, 13, 14, 15, 16, 17, 18 AND 19.—OCTOBER TERM 1946

Heber Kimball Cleveland, Petitioner,
12 v.
The United States of America
Heber Kimball Cleveland, Petitioner,
13 v.
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Heber Kimball Cleveland, Petitioner,
14 v.
The United States of America
David Brigham Darger, Petitioner,
15 v.
The United States of America
Vergel Y. Jessop, Petitioner,
16 v.
The United States of America
Theral Ray Dockstader, Petitioner,
17 v.
The United States of America
L. R. Stubbs, Petitioner,
18 v.
The United States of America
Follis Gardner Petty, Petitioner,
19 v.
The United States of America

Petition for Rehearing

CLAUDE T. BARNES
Attorney for Petitioners

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The United States of America

Petition for Rehearing

CLAUDE T. BARNES
Attorney for Petitioners

In a spirit of humility, befitting their lowly and sincere estate, the defendants respectfully petition for a rehearing of this important decision; and in support thereof they point out the following:

1.

The Court has at last apparently determined, that the White Slave Act should be confined to prostitution or debauchery, a conclusion for which we assiduously argued.

2.

The Court has indicated, as we contended, that the Caminetti Case in all likelihood was decided on the basis of debauchery.

3.

The Court in its reasoning, however, has committed one egregious error—it has held that polygamy is in the genus of prostitution and debauchery. All the learned works we have perused in the fields of anthropology, sociology, etymology, theology and religion, have held to the contrary. We are helpless, therefore, if the Court prefers to base its decision on a premise that is untenable among the scholars of the world.

We cite only a work that we all respect and admire, the Encyclopaedia Britannica:

(Marriage)—"Prostitution is not correlated with marriage".

(Prostitution)—"It has always been distinguished in law and custom from concubinage, which is an inferior state of marriage".

In giving weight to the Bitty case, the Court has failed to distinguish between the Biblical concubine and the paid mistress, in modern connotation erroneously called "concubine". We again cite a work we all respect, the Oxford English Dictionary:

(Concubine):-"In reference to polygamous peoples, as the ancient Hebrews and Mohammedans: A 'secondary wife' whose position is recognized by law, but is inferior to that of a wife".

Not even the prosecution herein ever intimated that the defendants were practicing either prostitution or debauchery; in oral argument it admitted they were "sincere". In fact through-

out these cases the prosecution, relying on Caminetti, has assumed that it had to prove only that the actions of the defendants were immoral, not, indeed, that they amounted to prostitution or debauchery.

Ignoring all religious belief and their conception of the sacredness of their relationship, the defendants still did nothing savoring of prostitution or debauchery. Their children belie such a thought.

The defendants do not maintain that their religious belief permitted them to do what others could not do; but that their actions, judged objectively by impartial observers unaware of their sacred belief, had none of the characteristics of either prostitution or debauchery.

What the defendants cannot understand is this: In Biblical law the prostitute was regarded as "spittle" (Ecc. 26:22) "shameless as a dog" (Prov. 23:28) and was sometimes "burnt with fire" (Lev. 21:9). With this they agree. When it came to wives, however, and the men who had many, the Lord called Abraham his friend and said David was a man after his own heart. The defendants follow the law of Abraham, and cannot comprehend why their wives are by this Court called prostitutes.

The fact that some of the defendants have already suffered imprisonment for what they did is by the Court ignored.

No Federal law against polygamy exists except in the District of Columbia and the Territories of the United States; the defendants, therefore, broke no Federal law unless what they did amounted to either prostitution or debauchery, two things abominated by themselves, their heritage, their Bible and their God.

4.

We come now to an entirely new point, one missed both by the Court and myself, but one that my months of deliberation should have disclosed, since the Court relies upon counsel to present all his arguments. It, however, makes inevitable the reversal of these cases.

This brilliant Court, opposing Counsel, and myself, have, as you well know, scratched our heads to determine impartially whether the marriage relations of these defendants with their wives constituted prostitution or debauchery. In argument I felt the sincere cooperation of the Court on that question. Not once did it occur to me, however, to call to the attention of the

Court a thing we all knew, had we but thought, that the practice of these defendants has for more than sixty years been determined by United States statute **to be unlawful cohabitation and not prostitution or debauchery at all.**

The statute to which I refer (18 U.S.C.A. Sec. 514, Crim. Code Sec. 314) reads as follows:

> "If any male person cohabits with more than one woman, he shall be fined not more than $300, or imprisoned not more than six months or both."

It was enacted into law on March 28, 1882, (22 Stat. 31) for the express purpose of striking the Mormon situation wherein a man held out to the world two or more women as his wives and cohabited with them as such.

> Cannon v. U. S., 6 S. Ct. 278, 116 U. S. 55.
> U. S. v. Snow, 4 Utah 295, 9 P. 686, 118 U. S. 346.
> (See many cases cited in the notes to 18 U. S. S. C. A. Sec. 514).

Parenthetically let me observe that the word "polygamy" is inept in all of our discussion, because it connotes two or more legal marriages with licenses, etc., in other words, bigamy plus one or more, polygamy. It has no application to these defendants, who always claimed only one legal wife according to the law of the land.

Hence in 1882 Congress passed the foregoing statute against men having only one legal wife but several other wives by their religious ceremonies.

It is admitted by all that these defendants were practicing unlawful cohabitation, but if the court will refer to the notes under 18 U.S.C.A. Sec. 514 it will see that not one of the cases cited referred to Mormon wives as prostitutes or debauchees. Note the penalty—six months or $300, or both.

Let's bring this down to specific measurement: if these defendants were living with their wives in the District of Columbia they would be guilty of unlawful cohabitation and the Court could not impose upon them a White Slave Act sentence. It would have to admit that they were practicing only unlawful cohabitation, as specifically enacted for their situation. The penalty would be 6 months or $300, or both—not 5 years! Not even the prosecution will assert that there is the slightest difference between the practices of these defendants and those of the defendants in old Mormon cases sixty years ago. Congress de-

fined their relationship then; it defines it now—unlawful cohabitation, which has no relationship whatsoever with either prostitution or debauchery.

Long before the White Slave Act was enacted into law Congress knew very well how to include "polygamy" and "unlawful cohabitation" when it so desired; it had no thought of either in its deliberations over "white slaves".

It is of course the duty of a lawyer to present to the Court all his points in the first instance; but I was fighting against the all inclusion ambiguity of "other immoral purpose" in the Act and attempting to have the Court hold that those words could mean only prostitution or debauchery.

Now that that point appears under **ejusdem generis** to be conceded, it is apparent why I did not present to the Court before the statute on unlawful cohabitation, which a **coup sur** defines the actions of the defendants as not either prostitution or debauchery.

Some one in the State of Utah in 1935 with a vindictive heart caused the penalty of the Utah unlawful cohabitation statute to be raised from six months to five years! Believe it or not, the defendants herein, Cleveland and Darger, are now serving those five years! It is incredible but true.

Thus by both State and Federal statute the actions of these defendants are described as unlawful cohabitation. Does this Court care to jump the penalty therefor from six months to the White Slave Act of five years?

**Ipso facto** when Utah became a state it took over its unlawful cohabitation cases itself, the Federal government has no jurisdiction over them under its own definition of unlawful cohabitation, which does not even resemble prostitution or debauchery.

By reversing these cases the Court of course does not decide (a) that religious belief is an excuse for crime; (b) that plurality of wives is a good practice. What it does determine in such reversal is, that by the statute of the United States concerning unlawful cohabitation the actions of the defendants were neither debauchery or prostitution as contemplated in the White Slave Act. It leaves to the States, or the government in territories, their own prosecutions for unlawful cohabitation.

Trusting that the Court will be kind to this late presentation of the real explanation of these cases, and with every respect for its sense of justice on rehearing, I am,

Respectfully,

CLAUDE T. BARNES

Attorney for Petitioners.

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I respectfully certify that the points set forth in the petition of the petitioners are in my judgment well taken; and the petition is certainly not filed for any purpose of delay.

CLAUDE T. BARNES

Attorney for Petitioners.

# SUPREME COURT OF THE UNITED STATES

Nos. 12, 13, 14, 15, 16, 17, 18 AND 19.—OCTOBER TERM, 1946.

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19 *v.*
The United States of America.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[November 18, 1946.]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioners are members of a Mormon sect, known as Fundamentalists. They not only believe in polygamy; unlike other Mormons,[1] they practice it. Each of petitioners, except Stubbs, has, in addition to his lawful wife, one or more plural wives. Each transported at least one plural wife across state lines,[2] either for the purpose of cohabiting with her, or for the purpose of aiding another member of the cult in such a project. They were convicted of violating the Mann Act (36 Stat. 825, 18 U. S. C. § 398) on a trial to the court, a jury having been waived. 56 F. Supp. 890. The judgments of conviction were affirmed on appeal. 146 F. 2d 730. The cases are here on petitions for certiorari which we granted in view of the asserted conflict between the decision below and *Mortensen* v. *United States*, 322 U. S. 369.

The Act makes an offense the transportation in interstate commerce of "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose". The decision turns on the meaning of the latter phrase, "for any other immoral purpose".

*United States* v. *Bitty*, 208 U. S. 393, involved a prosecution under a federal statute making it a crime to import an alien woman "for the purpose of prostitution or for any other immoral purpose." The act was construed to cover a case where a man imported an alien woman so that she should live with him as his concubine. Two years later the Mann Act was passed. Because of the similarity of the language used in the two acts, the *Bitty* case became

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[1] The Church of Jesus Christ of Latter-Day Saints has forbidden plural marriages since 1890. See *Toncray* v. *Budge*, 14 Ida. 621, 654–55.

[2] Petitioners' activities extended into Arizona, California, Colorado, Idaho, Utah and Wyoming.

a forceful precedent for the construction of the Mann Act. Thus one who transported a woman in interstate commerce so that she should become his mistress or concubine was held to have transported her for an "immoral purpose" within the meaning of the Mann Act. *Caminetti* v. *United States*, 242 U. S. 470.

It is argued that the *Caminetti* decision gave too wide a sweep to the Act; that the Act was designed to cover only the white slave business and related vices; that it was not designed to cover [illegible] actions bereft of sex commercialism; and that in any event it should not be construed to embrace polygamy, which is a form of marriage and, unlike prostitution or debauchery or the concubinage involved in the *Caminetti* case, has as its object parenthood and the creation and maintenance of family life. In support of that interpretation an exhaustive legislative history is submitted which, it is said, gives no indication that the Act was aimed at polygamous practices.

While *Mortensen* v. *United States*, *supra*, p. 377, rightly indicated that the Act was aimed "primarily" at the use of interstate commerce for the conduct of the white slave business, we find no indication that a profit motive is a *sine qua non* to its application. Prostitution, to be sure, normally suggests sexual relations for hire.[3] But debauchery has no such implied limitation. In common understanding the indulgence which that term suggests may be motivated solely by lust.[4] And so we start with words which by their natural import embrace more than commer-

[3] "Of women: The offering of the body to indiscriminate lewdness for hire (esp. as a practice or institution); whoredom, harlotry." 8 Oxford English Dictionary 1497.

[4] "Vicious indulgence in sensual pleasures." 3 Oxford English Dictionary 79; "Excessive indulgence in sensual pleasures of any kind; gluttony; intemperance; sexual immorality; unlawful indulgence of lust." 3 Century Dict. Rev. Ed. 1477.

cialized sex. What follows is "any other immoral purpose". Under the *ejusdem generis* rule of construction the general words are confined to the class and may not be used to enlarge it. But we could not give the words a faithful interpretation if we confined them more narrowly than the class of which they are a part.

That was the view taken by the Court in the *Bitty* and *Caminetti* cases. We do not stop to reexamine the *Caminetti* case to determine whether the Act was properly applied to the facts there presented. But we adhere to its holding, which has been in force for almost thirty years,[5] that the Act, while primarily aimed at the use of interstate commerce for the purposes of commercialized sex, is not restricted to that end.

We conclude, moreover, that polygamous practices are not excluded from the Act. They have long been outlawed in our society. As stated in *Reynolds* v. *United States*, 98 U. S. 145, 164:

> "Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. At common law, the second marriage was always void (2 Kent, Com. 79), and from the earliest history of England polygamy has been treated as an offense against society."

As subsequently stated in *Mormon Church* v. *United States*, 136 U. S. 1, 49, "The organization of a community for the spread and practice of polygamy is, in a measure,

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[5] *Blackstock* v. *United States*, 261 Fed. 150; *Carey* v. *United States*, 265 Fed. 515; *Elrod* v. *United States*, 266 Fed. 55; *Burgess* v. *United States*, 294 Fed. 1002; *Corbett* v. *United States*, 299 Fed. 27; *Hart* v. *United States*, 11 F. 2d 499; *Ghadiali* v. *United States*, 17 F. 2d 236; *United States* v. *Reginelli*, 133 F. 2d 595; *Poinderter* v. *United States*, 139 F. 2d 158; *Simon* v. *United States*, 145 F. 2d 345; *Qualls* v. *United States*, 149 F. 2d 801; *Sipe* v. *United States*, 150 F. 2d 984; *United States* v. *Chaplin*, 54 F. Supp, 682.

a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world." And see *Davis* v. *Beason*, 133 U. S. 333. Polygamy is a practice with far more pervasive influences in society than the casual, isolated transgressions involved in the *Caminetti* case. The establishment or maintenance of polygamous households is a notorious example of promiscuity. The permanent advertisement of their existence is an example of the sharp repercussions which they have in the community. We could conclude that Congress excluded these practices from the Act only if it were clear that the Act is confined to commercialized sexual vice. Since we cannot say it is, we see no way by which the present transgressions can be excluded. These polygamous practices have long been branded as immoral in the law. Though they have different ramifications, they are in the same genus as the other immoral practices covered by the Act.

The fact that the regulation of marriage is a state matter does not, of course, make the Mann Act an unconstitutional interference by Congress with the police powers of the States. The power of Congress over the instrumentalities of interstate commerce is plenary; it may be used to defeat what are deemed to be immoral practices; and the fact that the means used may have "the quality of police regulations" is not consequential. *Hoke* v. *United States*, 227 U. S. 308, 323; see *Athanasaw* v. *United States*, 227 U. S. 326; *Wilson* v. *United States*, 232 U. S. 563.

Petitioners' second line of defense is that the requisite purpose was lacking. It is said that those petitioners who already had plural wives did not transport them in interstate commerce for an immoral purpose. The test laid down in the *Mortensen* case was whether the transportation was in fact "the use of interstate commerce as a calculated means for effectuating sexual immorality." 322 U. S. p. 375. There was evidence that this group of petitioners

in order to cohabit with their plural wives found it necessary or convenient to transport them in interstate commerce and that the unlawful purpose was the dominant motive. In one case the woman was transported for the purpose of entering into a plural marriage. After a night with this petitioner she refused to continue the plural marriage relationship. But guilt under the Mann Act turns on the purpose which motivates the transportation, not on its accomplishment. *Wilson* v. *United States, supra,* pp. 570–71.

It is also urged that the requisite criminal intent was lacking since petitioners were motivated by a religious belief. That defense claims too much. If upheld, it would place beyond the law any act done under claim of religious sanction. But it has long been held that the fact that polygamy is supported by a religious creed affords no defense in a prosecution for bigamy. *Reynolds* v. *United States, supra.* Whether an act is immoral within the meaning of the statute is not to be determined by the accused's concepts of morality. Congress has provided the standard. The offense is complete if the accused intended to perform, and did in fact perform, the act which the statute condemns, viz., the transportation of a woman for the purpose of making her his plural wife or cohabiting with her as such.

We have considered the remaining objections raised and find them without merit.

*Affirmed.*

MR. JUSTICE BLACK and MR. JUSTICE JACKSON think that the cases should be reversed. They are of opinion that affirmance requires extension of the rule announced in the *Caminetti* case and that the correctness of that rule is so dubious that it should at least be restricted to its particular facts.

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On Writs of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[November 18, 1946.]

MR. JUSTICE RUTLEDGE, concurring.

I concur in the result. Differences have been urged in petitioners' behalf between these cases and *Caminetti* v. *United States*, 242 U. S. 470.[1] Notwithstanding them, in my opinion it would be impossible rationally to reverse the convictions, at the same time adhering to *Caminetti* and later decisions perpetuating its ruling.[2]

It is also suggested, though not strongly urged, that *Caminetti* was wrongly decided and should be overruled. Much may be said for this view. In my opinion that case and subsequent ones following it extended the Mann Act's coverage beyond the congressional intent and purpose, as the dissenting opinion of Mr. Justice McKenna convincingly demonstrated. 242 U. S. at 496.[3] Moreover, as I also think, this legislation and the problems presented by the cases arising under it are of such a character as does not allow this Court properly to shift to Congress the responsibility for perpetuating the Court's error.

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[1] Counsel has emphasized the religious aspect presented by these cases and has stressed the familial aspect and purpose of so-called "celestial marriage" in the Mormon conception as distinguishing the relation in fact and in consequence from such as were involved in the *Caminetti* and other Mann Act cases. The argument from religious motivation has been foreclosed, so far as legislative power is concerned, since *Reynolds* v. *United States*, 98 U. S. 145. Apropos of the Mann Act's application, the relationship is not only illegal under state law but also as regular and continuous as that involved in *Caminetti*, or more so.

[2] See e. g., *Gebardi* v. *United States*, 287 U. S. 112; *United States* v. *Reginelli*, 133 F. 2d 595; *Christian* v. *United States*, 28 F. 2d 114. Compare *United States* v. *Beach*, 324 U. S. 193; *Mortensen* v. *United States*, 322 U. S. 369.

[3] See also the dissenting opinion of MR. JUSTICE MURPHY herein. The dissenting opinion in the *Caminetti* case was joined by the Chief Justice and Mr. Justice Clarke. Only five justices adhered to the majority opinion, Mr. Justice McReynolds not participating. Cf. the opinion of Mr. Justice McKenna in *Athanasaw* v. *United States*, 227 U. S. 326.

Notwithstanding recent tendency, the idea cannot always be accepted that Congress, by remaining silent and taking no affirmative action in repudiation, gives approval to judicial misconstruction of its enactments. See *Girouard* v. *United States*, 328 U. S. —, —. It is perhaps too late now to deny that, legislatively speaking as in ordinary life, silence in some instances may give consent.[4] But it would be going even farther beyond reason and common experience to maintain, as there are signs we may be by way of doing, that in legislation any more than in other affairs silence or nonaction always is acquiescence equivalent to action.

There are vast differences between legislating by doing nothing and legislating by positive enactment, both in the processes by which the will of Congress is derived and stated[5] and in the clarity and certainty of the expression of its will.[6] And there are many reasons, other than to indicate approval of what the courts have done, why Congress may fail to take affirmative action to repudiate their misconstruction of its duly adopted laws. Among them may be the sheer pressure of other and more important business. See *Moore* v. *Cleveland Ry. Co.*, 108 F. 2d 656, 660. At times political considerations may work to forbid taking corrective action. And in such cases, as well as others, there may be a strong and proper tendency

[4] As an original matter, in view of the specific and constitutional procedures required for the enactment of legislation, it would seem hardly justifiable to treat as having legislative effect any action or nonaction not taken in accordance with the prescribed procedures.

[5] See note 4. Legislative intent derived from nonaction or "silence" lacks all the supporting evidences of legislation enacted pursuant to prescribed procedures, including reduction of bills to writing, committee reports, debates, and reduction to final written form, as well as voting records and executive approval. Necessarily also the intent must be derived by a form of negative inference, a process lending itself to much guesswork.

[6] See note 5.

to trust to the courts to correct their own errors, see *Girouard* v. *United States*, *supra*, at —, as they ought to do when experience has confirmed or demonstrated the errors' existence.

The danger of imputing to Congress, as a result of its failure to take positive or affirmative action through normal legislative processes, ideas entertained by the Court concerning Congress' will, is illustrated most dramatically perhaps by the vacillating and contradictory courses pursued in the long line of decisions imputing to "the silence of Congress" varied effects in commerce clause cases.[7] That danger may be and often is equally present in others. More often than not the only safe assumption to make from Congress' inaction is simply that Congress does not intend to act at all. Cf. *United States* v. *American Trucking Assn.*, 310 U. S. 534, 550. At best the contrary view can be only an inference, altogether lacking in the normal evidences of legislative intent and often subject to varying views of that intent.[8] In short, although recognizing that by silence Congress at times may be taken to acquiesce and thus approve, we should be very sure that, under all the circumstances of a given situation, it has done so before we so rule and thus at once relieve ourselves from and shift to it the burden of correcting what we have done wrongly. The matter is particular, not general, notwithstanding earlier exceptional treatment and more recent tendency. Just as dubious legislative history is at times much overridden, so also is silence or inaction often mistaken for legislation.

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[7] See *Prudential Ins. Co.* v. *Benjamin*, 66 S. Ct. 1141, 1152; Ribble, State and National Power Over Commerce (1937) c. X; Bikle, The Silence of Congress (1927) 41 Harv. L. Rev. 200; Powell, The Validity of State Legislation under the Webb-Kenyon Law (1917) 2 So. L. Rev. 112. An example of judicial interpretation of the silence of Congress as giving consent to state legislation is *Wilson* v. *McNamee*, 102 U. S. 572, 575.

[8] Cf. note 5.

I doubt very much that the silence of Congress in respect to these cases, notwithstanding their multiplication and the length of time during which the silence has endured, can be taken to be the equivalent of bills approving them introduced in both houses, referred to and considered by committees, discussed in debates, enacted by majorities in both places, and approved by the executive. I doubt, in other words, that, in view of all the relevant circumstances including the unanticipated consequences of the legislation,[9] such majorities could have been mustered in approval of the *Caminetti* decision at any time since it was rendered. Nor is the contrary conclusion demonstrated by Congress' refusal to take corrective action.[10]

The *Caminetti* case, however, has not been overruled and has the force of law until a majority of this Court may concur in the view that this should be done and take action to that effect. This not having been done, I acquiesce in the Court's decision.

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[9] See opinion of Mr. Justice McKenna, 242 U. S. at 502, dissenting in *Caminetti* v. *United States*; see also the dissenting opinion in *United States* v. *Beach*, 324 U. S. 193, 199-200.

[10] Since the *Caminetti* decision two bills have been introduced to limit the effect of that case. S. 2438, 73d Cong., 2d Sess.; S. 101, 75th Cong., 1st Sess. Neither was reported out of committee. In such circumstances the failure of Congress to amend the Act raises no presumption as to its intent. *Order of Railway Conductors* v. *Swan*, 152 F. 2d 325, 329.

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On Writs of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[November 18, 1946.]

MR. JUSTICE MURPHY, dissenting.

Today another unfortunate chapter is added to the troubled history of the White Slave Traffic Act. It is a chapter written in terms that misapply the statutory language and that disregard the intention of the legislative framers. It results in the imprisonment of individuals whose actions have none of the earmarks of white slavery, whatever else may be said of their conduct. I am accordingly forced to dissent.

The statute in so many words refers to transportation of women and girls across state lines "for the purpose of prostitution or debauchery, or for any other immoral purpose." The issue here is whether the act of taking polygamous or plural wives across state lines, or taking girls across state borders for the purpose of entering into plural marriage, constitutes transportation "for any other immoral purpose" so as to come within the interdict of the statute.

The Court holds, and I agree, that under the *ejusdem generis* rule of statutory construction the phrase "any other immoral purpose" must be confined to the same class of unlawful sexual immoralities as that to which prostitution and debauchery belong. But I disagree with the conclusion that polygamy is "in the same genus" as prostitution and debauchery and hence within the phrase "any other immoral purpose" simply because it has sexual connotations and has "long been branded as immoral in the law" of this nation. Such reasoning ignores reality and results in an unfair application of the statutory words.

It is not my purpose to defend the practice of polygamy or to claim that it is morally the equivalent of monogamy. But it is essential to understand what it is, as well as what it is not. Only in that way can we intelligently decide whether it falls within the same genus as prostitution or debauchery.

There are four fundamental forms of marriage: (1) monogamy; (2) polygyny, or one man with several wives; (3) polyandry, or one woman with several husbands; and (4) group marriage. The term "polygamy" covers both polygyny and polyandry. Thus we are dealing here with polygyny, one of the basic forms of marriage. Historically, its use has far exceeded that of any other form. It was quite common among ancient civilizations and was referred to many times by the writers of the Old Testament; even today it is to be found frequently among certain pagan and non-Christian peoples of the world. We must recognize, then, that polygyny, like other forms of marriage, is basically a cultural institution rooted deeply in the religious beliefs and social mores of those societies in which it appears. It is equally true that the beliefs and mores of the dominant culture of the contemporary world condemn the practice as immoral and substitute monogamy in its place. To those beliefs and mores I subscribe, but that does not alter the fact that polygyny is a form of marriage built upon a set of social and moral principles. It must be recognized and treated as such.

The Court states that polygamy is "a notorious example of promiscuity." The important fact, however, is that, despite the differences that may exist between polygamy and monogamy, such differences do not place polygamy in the same category as prostitution or debauchery. When we use those terms we are speaking of acts of an entirely different nature, having no relation whatever to the various forms of marriage. It takes no elaboration here to point out that marriage, even when it occurs in a form of which we disapprove, is not to be compared with prostitution or debauchery or other immoralities of that character.

The Court's failure to recognize this vital distinction and its insistence that polygyny is "in the same genus" as prostitution and debauchery do violence to the anthro-

pological factors involved. Even etymologically, the words "polygyny" and "polygamy" are quite distinct from "prostitution," "debauchery" and words of that ilk. There is thus no basis in fact for including polygyny within the phrase "any other immoral purpose" as used in this statute.

One word should be said about the Court's citation of *United States* v. *Bitty*, 208 U. S. 393, and the statement that the interpretation of the statute there involved is a forceful precedent for the construction of the White Slave Traffic Act. The thought apparently is that the phrase "any other immoral purpose," appearing in the White Slave Traffic Act, was derived from the identical phrase used in the statute regulating the immigration of aliens into the United States, the statute which was under consideration in the *Bitty* case. 34 Stat. 898. That case concerned itself with the portion of the immigration statute forbidding "the importation into the United States of any alien woman or girl for the purpose of prostitution, or for any other immoral purpose." Significantly, however, the statute made separate provision for the exclusion of "polygamists, or persons who admit their belief in the practice of polygamy." Thus the phrase "any other immoral purpose," following the reference to prostitution, certainly did not comprehend polygamy. And if that statute, or the interpretation given it in the *Bitty* case, is to be any authority here, the conclusion to be drawn is inconsistent with the result reached by the Court today. As a matter of fact, Congress has always referred to polygamy by name when it desired to deal with that subject, as distinguished from immoralities in the nature of prostitution. See, for example, 8 U. S. C. § 364; 18 U. S. C. § 513.

The result here reached is but another consequence of this Court's long-continued failure to recognize that the White Slave Traffic Act, as its title indicates, is aimed

solely at the diabolical interstate and international trade in white slaves, "the business of securing white women and girls and of selling them outright, or of exploiting them for immoral purposes." H. Rep. No. 47, 61st Cong., 2d Sess., p. 11; S. Rep. No. 886, 61st Cong., 2d Sess., p. 11. The Act was suggested and proposed to meet conditions which had arisen in the years preceding 1910 and which had revealed themselves in their ugly details through extensive investigations. The framers of the Act specifically stated that it is not directed at immorality in general; it does not even attempt to regulate the practice of voluntary prostitution, leaving that problem to the various states. Its exclusive concern is with those girls and women who are "unwillingly forced to practice prostitution" and to engage in other similar immoralities and "whose lives are lives of involuntary servitude." *Ibid.* A reading of the legislative reports and debates makes this narrow purpose so clear as to remove all doubts on the matter. And it is a purpose that has absolutely no relation to the practice of polygamy, however much that practice may have been considered immoral in 1910.

Yet this Court in *Caminetti* v. *United States*, 242 U. S. 470, over the vigorous dissent of Justice McKenna in which Chief Justice White and Justice Clarke joined, closed its eyes to the obvious and interpreted the broad words of the statute without regard to the express wishes of Congress. I think the *Caminetti* case can be factually distinguished from the situation at hand since it did not deal with polygamy. But the principle of the *Caminetti* case is still with us today, the principle of interpreting and applying the White Slave Traffic Act in disregard of the specific problem with which Congress was concerned. I believe the issue should be met squarely and the *Caminetti* case overruled. It has been on the books for nearly 30 years and its age does not justify its continued existence. Stare decisis certainly does not require a court to perpetu-

ate a wrong for which it was responsible, especially when no rights have accrued in reliance on the error. Cf. *Helvering* v. *Hallock*, 309 U. S. 106, 121–22. Otherwise the error is accentuated; and individuals, whatever may be said of their morality, are fined and imprisoned contrary to the wishes of Congress. I shall not be a party to that process.

The consequence of prolonging the *Caminetti* principle is to make the federal courts the arbitrers of the morality of those who cross state lines in the company of women and girls. They must decide what is meant by "any other immoral purpose" without regard to the standards plainly set forth by Congress. I do not believe that this falls within the legitimate scope of the judicial function. Nor does it accord the respect to which Congressional pronouncements are entitled.

Hence I would reverse the judgments of conviction in these cases.